Supreme Court, U.S.
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No. 10-_____

In The
Supreme Court of the United States

DONN CARSWELL, ET AL.,
Petitioners,

v.

DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI`I,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of The State of Hawai`i

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Hawai`i owns land in Kokee State Park on the island of Kauai. Petitioners have leasehold estates in parcels on the land and own private cabins thereon. Each Petitioner or his or her predecessor in interest bought, built or inherited his or her private cabin. Collectively, the cabins are worth several million dollars. In 1985 when the prior land leases expired, the State required Petitioners, as a condition of retaining their leasehold interests in the land, to sign 20-year land leases containing a clause whereby Petitioners would be required to surrender their pre-existing residence cabins to the State in 2006, when the 1985 lease expired – and receive no compensation in return. This gives rise to the following question:

> 1. Whether a state may escape its constitutional obligation to pay just compensation for the taking of a citizen's pre-existing private property, by requiring the un-compensated surrender of the citizen's private property as a contract term in a land lease, where the lease contains no knowing, voluntary, clear or intelligent *waiver* of the constitutional right to just compensation – and where the state would have taken the same private property without just compensation if the lease was not signed, as drafted by the state.

RULE 29.6 STATEMENT

Petitioners have no parent companies, and no public company owns ten percent or more of their Stock.

LIST OF PARTIES

Petitioners:

Donn Carswell, Gale Carswell, Frank O. Hay, Paul T. Matsunaga, Linda M. Alimbayoguen, Peter Beckman, Peter K. Baldwin, Samuel Blair, Paulette Burtner, Joel Cavasso, Frank W.N. Cox, Virginia M.H. Dunas, Elizabeth Dunford, Glenn Hontz, Wayne Jacintho, Crystal S. Jones, Richard C. Jones, David Koch, Lelani Corporation, Joann Givens, Michael Givens, Basil L. Mayo, Sherill E. Miller, Barbara Putzier, Karl Ramirez, Patricia Sheehan, Vicky Taylor, A.J. Toulon, JR., Elizabeth Toulon, Waimea Garage, Ltd., Cecilia A. Williams, Harwood D. Williamson, Nancy H. Williamson, Cynthia Wilson, James Wilson, Waiyee Carmen Wong

Respondents:

Department of Land and Natural Resources, State of Hawai`i

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Intermediate Court of Appeals of the State of Hawai`i and the Order Rejecting Application for Writ of Certiorari of the Supreme Court of the State of Hawai`i in this case.

OPINIONS BELOW

The Order Rejecting Application for Writ of Certiorari of the Supreme Court of the State of Hawai`i is unreported and is reproduced in the Appendix, *infra*, 73-74. The Order of the Intermediate Court of Appeals of the State of Hawai`i, I.C.A. No. 28730, is unreported and is reproduced in the Appendix, *infra*, 64-72.

JURISDICTION

The Order Rejecting Application for Writ of Certiorari of the Supreme Court of the State of Hawai`i was entered on October 12, 2009 and reproduced in the Appendix, *infra*, 73-74. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case presents a critical issue in the development of jurisprudence involving the takings clause of the Fifth Amendment to the United States Constitution. The State of Hawai`i owns land in Kokee State Park on the island of Kaua`i. Petitioners own private cabins on that land. For nearly ninety years citizens of this historic community have occupied that land under various forms of permits or leases, sometimes for as long as two decades at a time. Appellants or their predecessors-in-interest constructed or purchased the cabins at their own expense. In 1985 the State required that Petitioners execute 20-year Kokee land leases, as drafted by the State, as a condition of lease renewal. These 1985 leases contained a term that the State would later claim required Petitioners to surrender their pre-existing residence cabins to the State in 2006, when the 1985 lease expired. The 1985 lease is silent as to the issue of "just

compensation".

The relevant text of the "surrender" clause of the 1985 leases was as follows:

> That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon unless provided otherwise.

If Petitioners refused to sign the 1985 leases, they would have summarily lost their cabins and received no compensation from the State of Hawai`i at that time. Instead, Petitioners signed the 1985 leases – thus temporarily keeping their cabins from the state. Twenty-one years later, when the 1985 leases expired, the state claimed ownership of these cabins, maintaining that Petitioners had agreed to "surrender" them to the state – for no compensation - by signing the 1985 leases. The 1985 leases, nor any prior leases, contain any traditional waiver of the lessee's right to just compensation upon a taking of their private cabins for public use.

On February 10, 2006 the Hawai`i Board of Land and Natural Resources voted to auction the Kokee Land leases to the public at the end of the 1985 lease term, with new leases including both

the land and the cabins to go to the highest bidder at public auction. Petitioners timely filed a request for a Contested Case Hearing with the Land Board, which was denied. Petitioners filed their Complaint in the Fifth Circuit Court of the Fifth Circuit of the State of Hawai`i on April 11, 2006, and filed a First Amended Complaint on June 20, 2006. Count one of their Complaint sought declaratory relief; Count two sought compensation for a taking of private property; and Count three sounded in reverse (or inverse) condemnation. App., *infra*, 99.

Petitioners and Respondents each filed motions for Summary Judgment in June 2006. The trial court denied both motions for Summary Judgment and the case went to trial on November 20, 2006. Prior to the taking of evidence at trial, the Parties stipulated that the case would be decided based on the testimony of "representative Plaintiffs" - and that the findings as to those representative Plaintiffs would be fairly applied to all of the Plaintiffs. The Parties stipulated at trial, inter alia, that:

> "As of November 2006, each named plaintiff is the owner, or affiliated with the owner of (at least) some interest in the cabins at issue (except Blair/Wong and Wisen as to which there is a dispute)"; and
>
> The State of Hawaii refused to allow

> the successful bidders in the 1985 auction to alter any of the terms in the 1985 lease as presented to them after the auction." App., *infra*, 75

Petitioners argued at Summary Judgment that like all other fundamental constitutional rights, the right to just compensation upon the state taking private property cannot be *contracted* away, absent a knowing, intelligent and clear waiver, of the right – fairly negotiated by the parties.

Petitioners also contended that the State had the burden of proving that Petitioners waived the constitutional right to just compensation if the state took the cabins – and the State presented no evidence of such a waiver at trial.

In Opening Statement at trial, Petitioners' stated, "The burden of proof rests on the government defendants to show a valid waiver of the constitutional right that the government seeks to negate. In this case, the government seeks to negate the constitutional right to compensation upon the taking of private property."

The State's burden of proving a valid waiver, before it could deprive a citizen of a fundamental constitutional right, also was the first topic addressed in closing argument.

On December 18, 2006 the trial court issued its Findings of Fact and Conclusions of Law, which denied Petitioners' request for just compensation. App., *infra*, 1.

The Court held that there was no necessity of a waiver of the right to just compensation, holding that plaintiffs' property rights had been surrendered pursuant to the lease – implicitly finding that no waiver of the right was constitutionally required - and that their property rights were not at issue.

Specifically, the Court ruled that:

> "41. Based on the factual findings noted above, the court concludes (even if the leases are ambiguous) that the parties understood, intended, and agreed that at the end of the lease term the State would own all improvements, including the cabins, and that the State would not compensate lessees for the cabins.
>
> 42. It follows that lessees have no "private property" that is or can be either taken or damaged. There is no taking and the State is not required to pay just compensation to plaintiffs." App., *infra*, 1.

No Court reviewing the case however has

considered whether a constitutionally sufficient waiver of the right to just compensation is required in a contract when the effect of the contract is the loss of the constitutional right.

On August 15, 2007 Petitioners stipulated for the dismissal without prejudice of Count two of the Complaint and the trial court entered judgment in favor of Respondents on all counts. The Court found that:

> [I]n this case, the Board is acting as a landlord, i.e. in its proprietary rather than its government capacity. The State is to be treated as other landlords in analogous situations. The 1985 Lease is governed generally by the law applicable to Leases between private individuals." Id. App., *infra*, 75.

Petitioners timely appealed to the Hawai`i Intermediate Court of Appeals (hereinafter referred to as, "I.C.A.") on September 4, 2007. Petitioner's first claim of error on appeal was that, "The trial court committed reversible error when it held that the state need not obtain a waiver before forcing a citizen to surrender a constitutional right as a condition of contracting with the State." In their brief, Petitioners argued that:

> [T]he trial Court erred by failing to require the State to prove that Plaintiffs waived their constitutional right to be compensated if the state condemned their cabins – and allowing the State to take ownership of millions of dollars worth of private residence-cabins, paying nothing in return. Appellants also contend that the Court erred in permitting the State to make the surrender of this fundamental constitutional right a condition of leasing land from the State in 1985. Appellant's Opening Brief, I.C.A. at 27.

The Intermediate Court of Appeals, like the trial court, held that Petitioners had contracted away their property rights (via leases that were silent as to compensation), and absent such property rights, the State could take title to private cabins and pay no compensation in return.

Specifically, the I.C.A found that "the State did not need to obtain Plaintiffs' waiver of their constitutional right to just compensation before claiming the cabins on Plaintiffs' leased lots because according to the unambiguous language of the 1985 Leases -- particularly the "Surrender" provision -- Plaintiffs had no such constitutional right." App., *infra*, 64.

In their Application for Writ of Certiorari to the Hawai'i Supreme Court, Petitioners argued:

> Petitioners were deprived of the right to be justly compensated when the State took their cabins in 2006. Although the courts below avoided the issue of waiver by holding that Petitioners had no property rights for which just compensation was due, Petitioners maintain that a waiver of the right to just compensation is required when the State seeks to rely on a term in a lease to justify its taking of private property without paying just compensation. Application for a Writ of Certiorari pp. 13.

Petitioners further argued that the 1985 lease cannot be considered a waiver of the right to just compensation, complaining that:

> [T]he trial Court held that the matter of compensation for the loss of property rights in the cabins was purely *contractual*. This holding ignores the fact that the subject lease resulted in the loss of a fundamental constitutional right, and that such a contract cannot stand absent a waiver. Id. at p. 14.

The Hawai`i Supreme Court rejected Petitioners' application for writ of certiorari without comment on October 12, 2009. App., *infra*, 73.

REASONS FOR GRANTING THE PETITION

This case raises a substantial federal question on an issue of national importance concerning conditions under which a state may deprive persons of their constitutional right to just compensation under the Fifth Amendment of the Constitution for the taking of pre-existing private property.

The decision of the Supreme Court of Hawai`i poses a fundamental threat to this right.

If the question presented by the petition is resolved against the Petitioners, the immediate effect will be virtually to nullify the constitutional compensation rights to just compensation through generic contract terms and fully absent any waiver of the right.

Petitioners contend that the fundamental constitutional right to just compensation upon the taking of private property is among those other constitutional rights for which knowing, voluntary and intelligent waivers are required before the government may escape its

constitutional obligations to justly compensate those from whom it takes private property.

This court has not directly confronted the question of what standard of consent is required for a person to waive the right to just compensation when the State takes the person's property by *contract*. Petitioners urge that any such waiver must be knowing, intelligent and clear.

The Declaration of Independence describes as inalienable the rights to life, liberty, and the pursuit of happiness. Some rights, however, are alienable and may be waived. For instance, consent to search is a means of waiving Fourth Amendment rights. Wayne R. LaFave, et al. CRIMINAL PROCEDURE § 3.10 (3d ed. 2000). Consent to adoption is a means of waiving parental rights. Homer H. Clark, Jr. THE LAWS OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.4 (2d ed. 1988). While consent is a means of waiving rights in many areas of law, these areas vary in their standards of consent. For example, the standards of consent governing contract clauses waiving the constitutional right to a trial by jury tend to be higher than those governing contracts generally. Jean R. Sternlight, *Mandatory Binding Arbitration and Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 674 (2001).

While never having directly addressed the

standard of consent required when a state alleges that a person has waived the person's right to just compensation for the taking of the person's property, in 1972 this Court did address contractual waivers of constitutional rights in a pair of cases touching on the deprivation of property.

In *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775. 31 L.Ed.2d 124 (1972), this Court considered whether to enforce a cognovit note, a contractual agreement "by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder." *Id.* at 176. The Court considered the constitutional requirement of due process "in a context of contract waiver, before suit has been filed, before any dispute has arisen, and whereby a party gives up in advance his constitutional right to defend any suit by the other, to notice and an opportunity to be heard, no matter what defenses he may have, and to be represented by counsel of this own choice." *Id.* at 184. In enforcing the contractual waiver of due process rights, the Court applied the standards applicable to waiver of constitutional rights in a criminal proceeding and held that the waiver was "voluntary, intelligently and knowingly" made. *Id.* at 187.

In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct.

1983, 32 L. Ed. 2d 556 (1972) (plurality decision) this Court held that debtors were deprived of their property without due process of law where debtor and creditor "were far from equal in bargaining power," and the "waiver provision was a printed part of a form sales contract." The Court held that a "waiver of constitutional rights in any context must, at the very *least*, be clear," and that it need not consider "the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver." *Id.* at 95. There was no clear waiver because the contracts,

> "simply provided that upon a default the seller 'may take back,' 'may retake' or 'may repossess' merchandise. The contracts included nothing about the waiver of a prior hearing. They did not indicate *how or through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing –the seller could take back the goods." *Id* at 95-95.

Similarly, federal courts have generally held that a contract that waives a constitutional litigation right should be enforced only if the waiver was knowing, voluntary, and in most cases, intelligent. *See, e.g., Lake James Cmty. Volunteer Fire Dep't Inc. v. Burke County*, 149 F.

3d 277, 280 (4th Cir. 1998)(stating that a contractual waiver of a constitutional right must be knowing and voluntary); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO*, 44 F.3d 1091, 1098 n.4 (2d Cir. 1995) (stating that a waiver of constitutional rights must be "voluntary, knowing, and intelligent"); *W.B. v. Matula*, 67 F.3d 484, 497 (3d Cir. 1995) (declining to enforce the agreement "unless its execution was knowing and voluntary"); *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 n. 5 (5th Cir 1981)(a waiver "not only must be voluntary but must be knowing , intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences."); *cf. Ceter v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997)(stating that principles governing waiver of constitutional rights apply equally in criminal and civil context).

Thus this Court and other federal courts have applied a heightened standard of consent when reviewing contract clauses that affect a waiver of constitutional rights.

In contrast, in the present case, the Hawai`i trial court found that the State agency was acting as a landlord, i.e. in its proprietary rather than its government capacity, and that the State's action with regard to the lease with Petitioners is to be treated by the courts in the same way as any other landlord-tenant agreement.

> "[I]n this case, the Board is acting as a landlord, i.e. in its proprietary rather than its government capacity. The State is to be treated as other landlords in analogous situations. The 1985 Lease is governed generally by the law applicable to Leases between private individuals." App., *infra*, 1.

Thus, ruled the Court, the 1985 Lease is governed generally by the law applicable to leases between private individuals – without regard to the necessity of a separate waiver of the resultant lost constitutional right.

The Hawai`i Intermediate Court of Appeals determined in the present case that the State did not need to obtain Plaintiffs' waiver of their constitutional right to just compensation before claiming the cabins on Plaintiffs' leased lots – based on a *contract* analysis. According to the court, under the "surrender" provision of the 1985 leases, Plaintiffs had no such constitutional right.

But the "surrender" provision was more akin to the invalidated clause in *Fuentes v. Shevin* than to an actual waiver as in Fuentes, the clause "included nothing about the waiver of a prior hearing." Here, the "surrender" clause made no mention whatsoever that the lessee was waiving a right to just compensation (or to due

process, for that matter) but instead merely required the lessee to "peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon[.]" The very mention of compensation is absent in the lease that purportedly disposes of the right to just compensation by its terms.

By the rulings and Orders in this case, the Hawai`i state courts subject a contract clause effectuating a waiver of a person's constitutional right to just compensation under the Fifth Amendment to the same standards as those governing contracts generally. This standard is a far lower bar than the standards of consent governing contract clauses waiving, for instance, the constitutional right to a trial by jury.

However, the just compensation clause, called by one constitutional scholar, "a paradigm of American privilege and immunity," was one of the first rights of the Bill of Rights to be applied to the states and, in fact, "[j]ury rights have fared less well in the Supreme Court." Akhil Reed Amar, THE BILL OF RIGHTS (1998). Deprivations based on alleged contractual waiver of the just compensation right should be subject to a higher standard than those applying under contract law generally.

Until this Court articulates a uniform standard, states will continue to effectively nullify

the just compensation right in cases where a state is able to prevail upon a court that contract language is a valid substitute for a waiver of such right, as occurred in this case.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Findings of Fact, Conclusions of Law, Fifth Circuit Court, State of Hawaii, dated December 19, 2006.....App. 1

Summary Disposition Order. Intermediate Court of Appeals, State of Hawaii, dated May 22, 2009.....App. 64

Order Rejecting Application for Writ of Certiorari, dated October 12, 2009.....App. 73

Stipulated Facts at Trial.....App. 75

First Amended Complaint, dated June 20, 2006.....App. 99

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT STATE OF HAWAI'I

DONN CARSWELL, GALE CARSWELL, FRANK O. HAY, PAUL T. MATSUNAGA, ARLINE Y. MATSUNAGA, LINDA M. ALIMBAYOGUEN, PETER BECKERMAN, PETER K. BALDWIN, SAMUEL BLAIR, PAULETTE BURTNER, JOEL CAVASSO, ERIK P. COOPERSMITH, FRANK W.N. COX, VIRGINIA M.H. DUNAS, ELIZABETH DUNFORD, GLENN HONTZ, WAYNE JACINTHO, CRYSTAL S. JONES, RICHARD C. JONES, DAVID KOCH, LEALANI CORPORATION, JOANN GIVENS, MICHAEL GIVENS, BASIL L. MAYO, SHERILL E. MILLER, BARBARA PUTZIER, KARL RAMIREZ, PATRICIA SHEEHAN, ROBERT T. SWENEY, VICKY TAYLOR, A.J. TOULON, JR., ELIZABETH TOULON, WAIMEA GARAGE, LTD., CECELIA A. WILLIAMS, HARWOOD D. WILLIAMSON, NANCY H. WILLIAMSON, CYNTHIA WILSON, JAMES WILSON, CRAIG WISEN,	CIVIL NO. 06-1-0049 (Injunctive Relief) (Declaratory Judgment) FINDINGS OF FACT, CONCLUSIONS OF LAW; ORDER Hearing Dates: 11/20/06 and 11/21/06 Judge: Kathleen N.A. Watanabe

WAIYEE CARMEN WONG, AND DOES 1-94

(All Original Plaintiffs except Wisen and Kyno are Appellants).

Plaintiffs/Appellants,

vs.

DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I, INDIVIDUAL DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10 AND DOE ENTITIES 1-10,

Defendants/Appellees.

FINDINGS OF FACT, CONCLUSIONS OF LAW

(Filed December 18, 2006)

I. BACKGROUND

1. This matter came on for a jury-waived trial on November 20 and 21, 2006. The court heard the testimony of all witnesses, reviewed the

exhibits admitted into evidence, and heard the statements and arguments of counsel. The court makes these findings based on its assessment of the credibility of witnesses, its interpretation of exhibits (where ambiguous), and its belief as to the weight to be given to the evidence received.

2. This case has been bifurcated. The sole issue tried at this time was the question of whether constitutional just compensation must be paid to plaintiffs in the event the State assumes ownership of the cabins at issue in this case after expiration of the subject leases. Stipulation to Bifurcate filed September 20, 2006.

3. This case concerns recreational-residential leases of lots at Koke'e State Park and Waimea Canyon State Park on the Island of Kauai. These parks and the general area are collectively referred to as "Koke'e" The State of Hawai'i owns the land at Koke'e, including the leased lots. All the lots are located in the conservation district. Exhibit 11 is a map of the Koke'e area, showing the general location of the parks and lots. Stipulated Facts 2, 6, and 119.

4. The Department of Land and Natural Resources ("DLNR" or the "department") is the department of the State charged to manage, administer, and exercise control over all of the State's public lands, including submerged land and beaches. Haw. Rev. Stat. § 26-15(b) (Cum. Supp. 2005); Haw. Rev. Stat. § 171-3 (Cum. Supp.

2005). The DLNR is headed by an executive board called the Board of Land and Natural Resources (the "Board"). Haw. Rev. Stat. § 26-15(a) (Cum. Supp. 2005).

5. Plaintiffs are or claim to be the present (as of the time of trial) holders of the leasehold interest in leases covering various lots at Koke'e. As to most of the lots at issue in this case, the parties have stipulated to ownership of the leasehold interest. Stipulated Facts 40-114. To the extent there are disputes or unresolved issues as to ownership of the leasehold interest, those issues need not be resolved in this phase of the case.

6. Lots at Koke'e have been used for recreational-residential purposes since at least the early 20th century. Stipulated Fact 4.

7. In November 1919, the Governor of the Territory set aside land at Koke'e to the County of Kauai for use as the Pu'u Ka Pele County Park. Exhibit 13. The Governor set aside additional land for the Park in 1923. Exhibit J4. Stipulated Facts 5.

8. Thereafter both the Territory of Hawai'i and the County of Kauai issued recreational-residential permits in the area. The County permits covered lots in Pu'u Ka Pele County Park. The Territory permits covered lots in Halemanu Camp Lots and Koke'e Camp Lots. Stipulated

9. Lots in or formerly in Pu'u Ka Pele County Park are referred to as "Pu'u Ka Pele Park Lot ___" Lots in either Koke'e Camp or Halemanu Camp are referred to as "Koke'e Camp Site Lot ___"

10. The exhibits in evidence in this case include Territory permits from as far back as 1918 and County permits from as far back as the 1930s. Stipulated Facts 9-12. Each of these forms of permits: 1) required the permittee to build and maintain a "cabin" on the property and 2) provided that if the permittee does not remove any improvements or structures at the end of the permit, then the Territory or County would own the improvements and structures. See:

> Exhibit J2 paragraph 5 - Portion of Territory permit as of 1918 ("upon failure to remove the structures within that period [30 days of the end of the permit] they shall become the property of the Government.")
>
> Exhibit J5 paragraph 5 - Form of County permit during the 1930s ("upon failure to remove the structures within that period [30 days of the end of the permit] they shall become the property of the County of Kauai.")

> Exhibit J6 paragraph 5 - Form of County permit in the 1950s ("upon failure to remove the structures within that period [30 days of the end of the permit] they shall become the property of the County of Kauai.")
>
> Exhibit J7 paragraph 10 - Example of Territory permit in the 1950s ("if such removal shall not have been accomplished within ninety days after the termination or cancellation of this permit it shall be conclusively presumed that such Permittee has abandoned the same to the Board and that said Board may thereafter treat such property as its own.")

11. Occupancy under the permits issued by the Territory in the 1950's was subject to "termination by the Board, at any time, in its sole discretion, whether for breach by the Permittee or otherwise" Exhibit J7.

12. At statehood, management of the Territory's lots at Koke'e was transferred to the Board of Land and Natural Resources. Stipulated Facts 13.

13. All Territory permits expired in 1961. Stipulated Facts 12. Accordingly, by Board action

on June 28, 1963 (Exhibit J9), the Board authorized new permits in the form of Exhibit J10, retroactive to July 1, 1961. Stipulated Fact 14. This permit was terminable upon 30 days notice and provided that improvements not removed at the end of the permit would be owned by the State. Exhibit J10 paragraph 24 ("if such removal shall not have been accomplished within ninety (90) days after the termination or cancellation of this Permit, it shall be conclusively presumed that such Permittee has abandoned the same and that said Board may thereafter treat such property as the Property of the State of Hawai'i.")

14. In 1965, the set aside of Koke'e land to the County for Pu'u Ka Pele County Park was canceled. Stipulated Facts 15.

15. On April 28, 1965, the County and the State jointly notified all holders of permits at Pu'u Ka Pele County Park that the land had been returned to the State and that all county permits were canceled as of June 30, 1965. Stipulated Facts 16; Exhibit JI8.

16. The State issued revocable permits to all occupants at Pu'u Ka Pele who had constructed improvements on the lot. Stipulated Fact 17; Exhibit J20. These new permits were in the same form as permits already issued to State Permittees - that is, they were terminable at will and provided that improvements not removed at

the end of the permit would be owned by the State. Exhibit J23 paragraph 24.

II. THE 1965 LEASES

17. At this same time, the State was exploring the possibility of issuing leases instead of permits. As explained to the Board:

> For some time there has been a general feeling among holders of these permits, some of whom have located substantial improvements on their lots, that in order to protect their investment, tenure other than provided by a permit would be desirable. Exhibit J29.

18. A problem was that existing law, then as now, required "except as otherwise specifically provided, all disposition of public lands shall be made at public auction after public notice". II Act 32, 1962 Hawai'i Session Laws at 101 (now codified as Haw. Rev. Stat. § 171-14).

19. The Board's chairperson, Jim Ferry, explained this to the State Senate during the 1965 legislative session. Exhibit 117. The legislature responded by passing Act 239, 1965 Hawai'i Session Laws 396, which among other things authorized the Board to negotiate leases at Koke'e directly, without going through the public auction process:

> Notwithstanding any limitations to the contrary, the board may lease, by direct negotiation and without recourse to public auction, lands within a state park or forest reserve and other lands set aside under executive orders, for recreation-residence use for a period not to exceed 20 years on such terms and conditions as may be prescribed by the board.

Section 38 of Act 239, 1965 Hawai'i Session Laws at 412. This law is presently codified as Haw. Rev. Stat. § 171-44.

20. Exercising this new power, the Board approved issuing leases by direct negotiation to Permittees at its public meeting of October 22, 1965. Stipulated Facts 18. Exhibit J29. The approved terms of the leases contained the same agreement as had governed the permits - improvements belonged to the State if not removed at the end of the lease. See Exhibit J29, page 5 ("if such removal shall not have been accomplished within ninety (90) days after the expiration, termination, or cancellation of the lease, then such improvements shall, at the Lessor's option, become the property of the Lessor, or the Lessor can have the improvements removed at the cost and expense of the Lessee.")

21. Each Permittee was informed of this and other terms. Each Permittee agreed. Stipulated Facts 19. Exhibit J31.

22. Most of the leases issued at this time were for a term of 20 years, expiring December 31, 1985. Some, however, were for 15 years, expiring December 31, 1980, and some were for 10 years, expiring December 31, 1975. Stipulated Facts 22. These different lengths were "based on the present condition of the improvements and the prior period of occupancy by the Permittee." Exhibit J29, page 1.

23. With respect to each 10 and 15 year lease, the State and the holder of the lessee's interest entered into a new lease expiring on December 31, 1985. Stipulated Facts 23. See Exhibits J46 and J50. The leases expiring December 31, 1985, and covering the lots at issue in this case are collectively referred to as "the 1985 leases."

24. Each of the 1965 leases (except the lease covering Koke'e Camp Site Lot 51) was in the form of Exhibit J32. Stipulated Facts 24. The 1965 lease covering Koke'e Camp Site Lot 51 is in evidence as Exhibit J49. Stipulated Facts 25.

25. The surrender clause of the 1965 leases (except the lease covering Koke'e Camp Site Lot 51) provided:

> 28. Surrender. That the Lessee shall,

at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all boundary fences, sewers, drains, roads, bridges and trees on the same; it being understood that if the Lessee shall have faithfully observed and performed all of the terms, covenants and conditions herein including but not limited to the payment of all sums owing the Lessor, the Lessee shall have the right to remove from the demised land all other improvements thereon erected or placed by or belonging to the Lessee, within ninety (90) days after the expiration of the term or sooner termination of the lease, and the Lessee shall, at Lessee's own expense, prior to the end of said term or other sooner termination thereof, or within such additional period after the expiration of said tern or other sooner termination thereof as the Lessor may allow, remove the same, together with all the debris therefrom and restore said premises to good order arid condition satisfactory to the Lessor. Such improvements remaining on the demised premises after ninety (90) days following the expiration of

> the term hereof or other sooner termination thereof or after the elapse of such additional time as the Lessor may allow for their removal, shall become the property of the Lessor; provided, however, that the Lessor, at its option, may require the Lessee to remove such improvements and restore the premises as provided herein.

Exhibit J32 paragraph 28 on pages 11-12 (underlining in original).

26. This agreement that the State owned the cabins if not removed at the end of the lease had continuously been in effect since 1918 and this understanding represented the general and common agreement with respect to leasehold properties in Hawai'i and this understanding reflected the common law of the State of Hawai'i.

27. As to the agreement since 1918, see all forms of County, Territory, and State permits discussed above. Exhibits J2, J5, J6, J7, J10, and J23.

28. As to the general and common agreement with respect to leasehold properties, at the time it was very common for persons to "own" their home in leasehold rather than fee simple. For example, the largest landowner and lessor was Bishop Estate. Its form of lease had the same general

terms as to improvements - remove or surrender,

> 22. SURRENDER. At the end of said term or other sooner determination of this lease Lessee will peaceably deliver up to Lessors possession of the demised land, together with all erections and improvements upon or belonging to the same, by whomsoever made, in good repair order and condition except as aforesaid; provided, however, that if not then in default hereunder Lessee may within sixty (60) days after such termination remove the buildings standing thereon.

Exhibit J35 paragraph 22 at page 6.

29. Similarly, the form lease of another major landowner, Kaneohe Ranch, contained the same agreement - remove or surrender:

> (20) [Lessor and Lessee agree] That at the end of the said term, or other sooner termination of this lease, the Lessee will peaceably and quietly deliver up to Lessors possession of the land hereby demised, together with all erections and improvements upon or belonging to the same, by whomsoever made, in good repair order and condition, provided,

> however, that the Lessee may, at the end of said term, but not at any sooner determination of this lease, remove the buildings standing thereon.

Exhibit J8 paragraph 20.

30. The Supreme Court examined a third large landowner's form of lease in Anthony v. Kualoa Ranch, Inc., 69 Haw. 112, 736 P.2d 55 (1987). Kualoa Ranch's form of lease, executed in 1953, had a provision effectively identical to those examined above:

> THAT on the last day of the term hereby demised or on any sooner termination thereof, the Lessee will peaceably and quietly yield and deliver up to the Lessor possession of the demised premises; PROVIDED, HOWEVER, that the Lessee, if he shall have observed and performed all of the covenants and conditions herein contained and on his part to be observed and performed, after giving written notice of his intention to the Lessor, shall have the privilege of removing any building or buildings which have been placed on the demised premises at his own expense, and if he shall remove the building or buildings, he shall clear

> the premises of all rubbish and debris and restore the surface to a condition satisfactory to the Lessor within such reasonable period as the Lessor shall prescribe[.]

Anthony v. Kualoa Ranch, Inc., 69 Haw. 112, 114, 736 P.2d 55,57 (1987).

31. The court takes judicial notice of the pervasiveness of the leasehold system in Hawai'i in both 1965 and 1985 and finds that Permittees and lessees, in both 1965 and 1985 would have been generally familiar with the leasehold system.

32. As to the common law of the State of Hawai'i, see Conclusions of Law Nos. 32-34.

III. THE 1985 AUCTION AND LEASES

33. By October 1983 (if not before) Koke'e leaseholders had formed the Koke'e Leaseholders Association (the "KLA") to work with the DLNR. Exhibit J53. By letter of October 10, 1983, the president of the KLA (Charles Haffner) wrote to the DLNR seeking information about "the intentions of the State relative to the Koke'e leases" and offering to "work [ ] with you and your staff on these matters or on anything concerned with the Koke'e leases." Exhibit J53.

34. The DLNR's staff met with lessees on several occasions. See Exhibits J54, J60, and J67.

35. Staff also received individual written comments (Exhibits J55 and J56) and corresponded with the KLA. Exhibits J58 and J61.

36. A factor in the discussions was an Attorney General's opinion that Haw. Rev. Stat. § 171-44 did not allow the Board to enter into leases by direct negotiation with holders of 1965 leases. Exhibits J57, J59, and J63.

37. The Department of Attorney General re-visited the issue in conjunction with the end of the 1985 leases. It has now advised the Board that the 1985 advice was incorrect and that the Board can use section Haw. Rev. Stat. § 171-44 to negotiate directly. Exhibit J176, page 2 (Bates stamped page 20004).

38. In November 1984, staff prepared a recommendation to the Board that new leases be disposed of by public auction. See Exhibit J66. Staff met with the KLA on December 3, 1984, to discuss this recommendation and to discuss the terms of the proposed lease. Exhibit J67. The proposal discussed at the meeting is in evidence as Exhibit J68.

39. The KLA (through Mr. Haffner) responded by reiterating lessees' request for direct

negotiations and by commenting on the staff submittal and proposed lease terms. See Exhibit J67.

40. The staff submittal (Exhibit J68 at page 3) notes that under the terms of the 1965 leases lessees own the cabins "until December 31, 1985, the date on which the existing leases expire." The lessee may elect to remove the cabin but "if the lessee does not elect to remove his/her owned improvements prior to December 31, 1985, then any improvements remaining on the land after said date revert to the State of Hawaii." Mr. Haffner did not quarrel with staffs interpretation. In particular he did not dispute that after the leases expire the State owns improvements not removed; he did not assert that this affects a taking for which just compensation is required.

41. The KLA later asserted that lessees' option to remove could be exercised up to 90 days after the lease ended. Exhibit J74, page 2. The State accepted this interpretation. Exhibit J82.

42. Mr. Haffner requested the State to purchase improvements from the 1965 lessees. First full paragraph on page 3 of Exhibit J67. But he did not request that the 1985 leases contain any provision for compensation or purchase.

43. Staff recommended that the surrender clause in the 1985 leases be different from that in most of the 1965 leases. Staff proposed that the

new surrender clause read:

> 12. Surrender. The lessee shall, at the end of said term, peaceably deliver unto the lessor, possession of the improvements existing or constructed thereon, unless provided otherwise. The lessor may at its option on or about the end of the lease elect to retain the improvements or require the lessee, at the lessee's own expense, to remove such improvements and restore the premises to a condition satisfactory to the lessor.

Exhibit J68 paragraph 12 on page 9.

Mr. Haffner's original comment was: "This section should provide the lessee with a reasonable amount of time to remove improvements." Exhibit J67, page 3.

44. The Board was originally scheduled to consider these issues on December 28, 1984. Exhibit J68. That meeting was deferred to January 25, 1985, so notice could be given to each lessee and so the meeting could be held on Kauai. Exhibit J69.

45. Staffs submittal for the re-scheduled meeting (revised in response to the KLA's comments, Exhibit J72) is in evidence as Exhibit

J75.

46. Before the re-scheduled Board meeting, staff received comments from attorneys who argued that if 1965 lessees were not successful bidders, then they "should receive some compensation for the value of his house," because removal "is economically unrealistic." Exhibit J70. An attorney for a lessee whose lot was not to be re-leased also argued for just compensation. Exhibit J71, page 2.

47. The KLA (this time through its vice president Randall J. Hee) submitted additional comments by letter dated January 25, 1985. Exhibit J74. Mr. Hee again acknowledged that the. surrender clause in the 1965 leases meant "Any improvements remaining after the 90 days or such additional time allowed by lessor becomes the property of the lessor." Exhibit J74 paragraph 1 on page 2. As to the 1985 lease, he voiced no objection to the provision that improvements become the property of the State if not removed. He merely requested that the same language from the 1965 leases be used. Exhibit J74 paragraph 7 on page 3.

48. As reflected in the minutes of the Board meeting (Exhibit J73, page 4 et seq), Mr. Hee also presented those comments to the Board. The Board rejected the KLA's comments and accepted staff's recommendations with the proviso that issues raised be addressed in finalizing the new

leases. Exhibit J73, page 7.

49. Staff gave notice of the Board's action to all lessees by letters dated February 13, 1985. Stipulated Fact 27; Exhibit J80.

50. Exhibit J79 relates to Koke'e Camp Site Lot 71, which is not one of the lots at issue in this case. The 1965 lease covering Koke'e Lot 71 is one of three different leases. Exhibit J184. The other different leases cover Koke'e Camp Site Lot 51, which lot is at issue and Pu'u Ka Pele Lot 4, which is not at issue. These three 1965 leases contained a different surrender clause providing that ownership of the improvements reverted to the State at the end of the lease (that is, January 1, 1985). See Exhibits J49 and J184 paragraph 31 at page 18. Exhibit J79 was not sent to all lessees. As to the importance of Exhibit J79, see Findings of Fact 83-85.

51. The DLNR, through Mr. Susumo Dno, responded to the KLA's letter of January 25, 1985 (Exhibit J74) by letter dated February 15, 1985. Exhibit J82.

52. Despite the problems created (see Exhibit J76), Mr. Ono accepted Mr. Hee's argument that lessees could elect to remove the cabins after the leases expired. This decision, taken together with the Board's decision to hold the auction before the expiration of the 1965 leases, had the important consequence that bidders other than the existing

lessees would not know whether they were bidding on a lot with improvements or without improvements. This gave an obvious advantage at the auction to existing lessees.

53. Another consequence of these decisions was that where someone other than the existing lessees was the successful bidder, the existing lessee retained the right to remove the cabin after the auction but before the new leases became effective. The State was therefore forced to tell bidders to bid as if the lots were unimproved (because the State could not be sure that the cabins would be there at the time of the new leases). Stipulated Facts 30. Exhibit J91.

54. A third consequence of these decisions was that they allowed the 1965 lessees to seek payment from successful 1985 'bidders in return for the 1965 lessees not removing the cabins.

55. In 1985, as now, lessees needed a Conservation District Use Permit ("CDUP") to remove their cabins. Haw. Rev. Stat. chapter 183C. In 1985, the DLNR obtained a blanket CDUP authorizing any lessee to remove his or her cabins. Exhibit J96.

56. The State did not repeat these problems with respect to the 1985 leases. First, the new leases did not allow lessees the additional 90 days after termination to decide whether to remove the cabins. As reflected in Exhibit J82 (paragraph 7

on page 3), the State specifically rejected the KLA's suggestion that the surrender clause from the 1965 lease be used again.

57. Second, the new auction (or other disposition of leases) will take place after the end of the 1985 leases and any holdover of these leases.

58. During 1985, three lawsuits were filed on behalf of 1965 lessees. Exhibits J87, J94, and J95 are copies of the complaints filed in those lawsuits. These lawsuits made much the same claims that are at issue here.

59. On February 13, 1985, the DLNR sent to each 1965 lessee a letter advising them of the Board's action and discussing options as to the cabins. Exhibit J80. Stipulated Facts 27.

60. On March 1, 1985, the DLNR sent to each 1965 lessee a letter advising them of changes to the proposed lease terms. Exhibit J85. Stipulated Fact 27.

61. On May 7, 1985, the DLNR sent to each 1965 lessee a letter advising them of the sale date. Exhibit J89. Stipulated Facts 27.

62. On May 28, 1985, the DLNR issued a press release regarding the auction. Exhibit J92.

63. On June 4, 1985, the DLNR sent to each 1965 lessee a letter (Exhibit J93) enclosing a copy of the Notice of Sale (Exhibit J90) and Conduct of Sale. Exhibit J91. Stipulated Facts 27. These documents gave information about the auction and most importantly:

> Advised bidders that the draft lease and other documents were available for review at the DLNR. Exhibit 91, page 1.
>
> Advised bidders "to ignore the value of structures when bidding at the auction" because these structures "are privately owned by the present leaseholders up to December 31, 1985. Exhibit 91, page 3. As discussed above, this statement was the consequence of DLNR's decisions 1) allowing lessees to postpone their decision to remove the cabins and 2) holding the auction before the leases expired.
>
> Advised bidders that "at the end of the lease term, all improvements on the land shall revert to State ownership." Exhibit 91 paragraph 8 on page 6.

64. The DLNR advertised the sale by publishing the Notice of Sale in the Honolulu

Advertiser, Honolulu Star-Bulletin, and Kauai Garden Isle on June 28, July 5, and July 12, 1985. Exhibit J97. Stipulated Facts 28. The published notice indicated that the terms and conditions of sale were "contained in the Conduct of Sale document and in the drafts of the lease documents" which were by "reference incorporated herein and made parts of this Notice of Sale." The advertisement also said: "All prospective bidders are instructed to thoroughly read said documents and to inspect said properties."

65. On July 9, 1985, the DLNR sent to each 1965 lessee a letter with a "final reminder" of the upcoming auction. Exhibit J98. Stipulated Fact 27.

66. The auction was held on July 23,24, and 25. Stipulated Facts 29. The auction procedure was "Bidding for each lease [began] at the upset rent - the final rent to be determined by the highest bid at the fall of the hammer." Exhibit J92. Cf. Exhibit J88 and Exhibit J91. Lease rent for the 1985 leases was determined by the bidding.

67. Each successful bidder executed a Memorandum of Lease in the form of Exhibit J99. Stipulated Facts 31.

68. On September 24 or 25, 1985, DLNR sent to each successful bidder or group of bidders for a

1985 lease a letter in the form of Exhibit J101. Stipulated Facts 32. This letter highlighted some terms of the lease. Among other things, the DLNR reminded each successful bidder "that at the end of the 20-year term or sooner termination date of the lease, you will surrender to the State all improvements existing on or constructed on the premises." Exhibit J101 paragraph f on page 2.

69. Each successful bidder or group of bidders at the July 1985 auction signed a 20-year lease in the form of Exhibit 1112. Stipulated Facts 35. Some of the leases had an effective date of January 1, 1986, and expired on December 31,2005. Some of the leases had an effective date of April 1, 1986, and expired on March 31, 2006. The reasons for the different commencement date had to do with when the successful bidders at the 1985 auction made arrangements as to existing improvements with prior lessees. Stipulated Facts 35. See Exhibit J101.

70. Each of the 1985 leases contained the following provisions (described in Findings of Fact 71-76) especially relevant to this case. Exhibit J112.

71. Paragraph 9 on page 8 says and means that upon expiration of the lease the State owns the cabins and all other leasehold improvements:

9. Improvements. [The parties

> agree] That the Lessee shall not at any time during said term construct, place, maintain and install on said premises any building, structure or improvement of any kind and description whatsoever except with the prior approval of the Board and upon such conditions the Board may impose, including the requirement that such building, structure or improvement be constructed of new materials only. The ownership thereof shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor. The Board reserves the right to limit the number of dwellings on the premises.

Emphasis added.

72. Paragraph 31 on page 20 requires the 1985 lessees to surrender the premises together with all improvements to the State at the end of the lease:

> 31. Surrender. [The parties agree] That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of

> the demised premises, together with all improvements existing or constructed thereon unless otherwise provided. The Lessor may, at its option, on or about the end of the lease elect to retain the improvements or require the Lessee, at the Lessee's own expense, to remove such improvements and restore the premises to a condition satisfactory to the Lessor.

73. Paragraph 21 on page 14 provides for the same result (State owns the cabins) if the lease is terminated for breach before the end of the term. It provides that upon termination for breach "all buildings and improvements thereon shall remain and become the property of the Lessor."

74. Paragraph 34 on page 21 requires plaintiffs to maintain fire insurance on the cabins "in the joint names of Lessor [and] Lessee." If a cabin bums down, lessee is to use the proceeds to rebuild. However, paragraph 34 also allows a lessee to surrender the lease instead of rebuilding. In that event:

> [T]he Lessee shall then receive that portion of the proceeds which the unexpired term of this lease at the time of said loss or damage bears to the whole of said term, the Lessor to retain the balance of said proceeds.

In other words, if a cabin were to bum down at the end of the 19th year of the lease, lessee could surrender the lease and receive five percent (1/20) of the insurance proceeds. The lion's share (95%) of the proceeds would go to the State. If a cabin burned downed the day before the lease ended, lessee would get none of the proceeds. This division of proceeds reflects the fact that ownership of the cabins vests in the State at the end of the lease.

75. Similarly, paragraph 23 on page 16 provides that if the property is condemned, a lessee is entitled to receive from the condemning authority "the proportionate value of the Lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease." In the alternative, lessee can remove or relocate the improvements. Again, this clause reflects the agreement that ownership of the cabins vests in the State at the end of the lease.

76. Paragraph 3 on page 4 reserves to the State:

> 3. Ownership of fixed improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater systems(s) located on the land prior to or on the commencement date of this lease,

> excluding (1) any recreation-residence cabin, building or structure existing on the premises prior to the commencement date of this lease which is not owned by Lessor and which has been purchased or acquired by Lessee(s) from the former occupant(s) of the premises and (2) those improvements constructed during the term of this lease, unless provided otherwise."

This paragraph reserves rights in improvements other than the cabins to the State during the term of the lease. The paragraph does not apply to the cabins and, therefore, does not conflict with paragraphs that do apply to the cabins.

77. Each of the 1985 leases was scheduled to expire on either December 31, 2005, or March 31, 2006. Stipulated Facts 35.

78. Each of the 1985 leases was extended on the same terms and conditions as contained in the original lease pursuant to Haw. Rev. Stat. § 171-40 (1993). As extended, each of the 1985 leases will expire on December 31, 2006. See e.g. Exhibit 1167. Stipulated Facts 37.

IV. INTERPRETATION OF THE LEASE

79. The plain terms of the leases state that lessees have no private property interest in the improvements after the end of the leases, because at that point "the ownership thereof shall vest in the Lessor." There is no language to the contrary.

80. That paragraph 9 on page 8 of the leases relates to all improvements including the cabins is shown by the language of the paragraph and by contemporaneous statements in the Conduct of Sale (Exhibit J91) ("at the end of the lease term, all improvements on the land shall revert to State ownership") and in the DLNR's post auction letter to each successful bidder or group of bidders for a 1985 lease (Exhibit J101) ("at the end of the 20-year term or sooner termination date of the lease, you will surrender to the State all improvements existing on or constructed on the premises").

81. This interpretation is also supported by the surrender clause and by the insurance and condemnation clauses. These latter clauses provide that if the improvements are burned or taken at the end of the lease, all of the proceeds go to the State as Lessor. These provisions reflect the fact that as the end of the lease draws near, lessee's rights in the improvements diminish to zero. The parties could not have intended and did not intend that if a cabin burned down the day before the lease ends, then lessee gets nothing, but if not then the lessee is paid the full, fee

simple value of the cabin.

82. The State's intention and understanding as to the meaning of the 1985 leases was that at the end of the term of the 1985 lease any and all improvements on the lots would belong to the State.

83. The State contemporaneously explained its understanding in Exhibit 179, which is a letter sent by Mr. Ono on February 8, 1985, to the holder of the 1965 lease covering Koke'e Camp Site Lot 71. The 1965 lease covering Koke'e Camp Lots 71 was different from the other 1965 leases. See Exhibit J184. Specifically it had a different surrender clause, which provided:

> 31. Surrender. That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon unless otherwise provided.

Exhibit 185 paragraph 31 on page 18.

This is the exact surrender language that was used for all the 1985 leases. Exhibit J112 paragraph 31 on page 20.

84. In Exhibit J79, the State reminded the 1965 lessee of Koke'e Camp Lot 71 that under this form of the surrender clause the State owned improvements on her lot as of the end of the lease:

> Important for you to be aware of is the fact that Paragraph 31, page 18 of your lease requires that the ownership of the buildings on the property revert to the State effective January 1, 1986.

85. Exhibit J79 further advised the 1965 lessee that as to Koke'e Camp Site lot 71, bidders at the July 1985 auction would bid for both the land and the structures: If you bid for the lot you now occupy and become the new lessee, the lease rent for the new lease will be a combination of rental value of the land and the structure.

86. Koke'e Camp Lot 71 is not one of the lots at issue in this case and is not the same as Pu'u Ka Pele Lot 71, which is at issue. See Stipulated Facts 44 and 45. The other two lots with this different form of 1965 lease are Koke'e Camp Lot 51 (which is at issue, Stipulated Facts 49-51) and Pu'u Ka Pele Lot 4 (not at issue). See Exhibit J184.

87. The successful 1985 bidders for Koke'e Camp Lot 51 had this same understanding. They received the generic September 1985 letter sent to

all bidders (Exhibit J101). In a letter dated October 10, 1985 (Exhibit J109), they quickly reminded the State that the September letter did not apply to them. They claimed (exactly as the State says in this case) that under the "different" form of surrender clause (the very clause contained in all the 1985 leases) the State owned all the improvements, including "structures," at the end of the lease. Therefore, their bid covered the land and improvements; they would not be buying improvements from the 1965 lessee.

88. The attorney for the lessees of these "different" 1965 lessees (the same attorney who had already filed three lawsuits against the State), also acknowledged that the surrender provision in the "different" 1965 leases (the same surrender clause that is in all the 1985 leases) "contain the provision reserving unto the lessor, i.e., the State, the ownership of all improvements of whatever kind or nature!" Exhibit J184.

89. Various documents sent out by the State (as described above) clearly said the State would own all improvements, including the cabins, at the end of the term. The State rewrote the portion of the surrender clause in the 1965 lease that gave lessees 90 days after expiration to whether to remove the cabin. The Board rejected lessees' request to reinstate that clause. Exhibits J74 paragraph 7 on page 3, J73, and J82 paragraph 7 on page 3. DLNR staff advised the Board that the twenty-year term of the lease afford successful

bidders a reasonable opportunity to amortize the costs of the cabins. Exhibit J75, page 4.

90. Furthermore, by the time of the auction the State was already being sued. Exhibits J87, J94, and J95. These cases included the same issue as is present in this case: lessees' allegation that lessees cannot remove the cabins from the lots and the State is therefore "taking" the cabins. See Exhibits J91 paragraphs 46-48 on page 15, J94 paragraphs 30-32 on page 15, and J95 paragraphs 30-32 on pages 11-12. The State could not have intended to be sued again, 20 years later, for the exact same issue.

91. As to the bidders' intent, the court finds and believes that they must necessarily have understood from the documents discussed above that they would not own the cabins when the leases expired. The 1965 lessees would have been aware of the entire history as discussed. New bidders might not have known the entire history, but they would have seen or been charged with seeing:

> The advertisement of sale (J97) which incorporated the Conduct of Sale and terms of the lease
>
> The Conduct of Sale (J91) which stated "at the end of the lease term, all improvements on the land shall revert to State ownership"

The September 1985 letter to successful bidders, which reiterated that at the end of the lease "you will surrender to the State all improvements existing on or constructed on the premises. Exhibit 102 paragraph h on page 3.

The lease itself, which contained all the provisions discussed above.

92. No documentary evidence to the contrary has been introduced.

93. Plaintiff Frank Hay testified (and the court finds) that he (Hay) knew he had no rights in the cabin at the end of the 1965 lease unless he was the successful bidder and that he knew the same result (no interest in the cabin at the end of the lease) was required by the 1985 lease. Mr. Hay understood the meaning of the 1985 lease but hoped that the State would not enforce or would not be allowed to enforce the 1985 lease as written.

94. To the extent lessees understood or intended something to the contrary, they did not communicate that contrary intent or understanding to the State.

95. In addition, plaintiffs or their predecessors have on a number of occasions admitted the exact

opposite of what they claim now. The statements of the 1985 bidders for Koke'e Cabin Lot 51 are discussed above. Finding of Fact 87.

96. On October 10, 1985, Elizabeth Toulon and plaintiff A. J. Toulon wrote to Governor Ariyoshi complaining about the auction process. Exhibit J110. In this letter, written before the Toulons even signed the 1985 lease, they admit the lease calls for improvements to revert to the State, without compensation for them:

> Another very questionable action in the auction as held is your [meaning the State's] contention that on the termination of a twenty year lease, during which the campsite lessees pay larger rentals than the lessees of full time residential properties in desirable living areas of Oahu, the improvements belong to the state - without condemnation or compensation!

97. Other lessees made similar statements during the 2002 legislative session. Lessees were lobbying the legislature to intervene and give them lessees rights not provided in the leases. While testifying before the legislature, successful bidder and plaintiff Paul Matsunaga stated his understanding that he would not be compensated for the cabins, the very remedy he now seeks. Mr. Matsunaga told the legislature: "We were

required to execute new leases, which force us to surrender our mountain homes at the end of the lease term - without a penny in compensation. Exhibit J159 (Bates stamp page 010381). See also Exhibit J160 (Bates stamp page 010410) and Exhibit J161 (Bates stamp page 010400).

98. Mr. Matsunaga was not a 1965 lessee. Stipulated Fact 114. Mr. Matsunaga's statement to the legislature that he had to enter into a lease with the State is not true. Mr. Matsunaga could have instead simply declined to bid.

99. Successful bidder and plaintiff Wayne Jacintho was also new to Koke'e in 1985. Stipulated Fact 103. Mr. Jacintho also knew that the terms of the lease precluded the payment by the State of compensation for the cabins and he so stated to the legislature in 2002: "We were required to execute new leases, which forced us to surrender our mountain homes at the end of the lease term - without a penny in compensation." Exhibit J159 (Bates stamp page 010386).

100. Mr. Jacintho's statement to the legislature that he had to enter into a lease with the State is not true. Mr. Jacintho could have instead simply declined to bid.

101. Plaintiff Frank Hay was already a 1965 lessee. Stipulated Fact 72. As a 1965 lessee he had a more extensive background at Koke'e. He also knew he was not and is not entitled to

compensation. As he told the legislature: "We [were] required to execute new leases, which force us to surrender our mountain homes at the end of the lease term- without a penny in compensation." Exhibit J159 (Bates stamp page 010394). See also Exhibit J160 (Bates stamp page 010414) and Exhibit J161 (Bates stamp page 010402).

102. The legislature did not pass any laws in response to lessees' concerns. It did, however, pass a resolution urging special treatment for the 1985 lessees, including House Resolution 111 (2002). Exhibit J162. The significance of this resolution is that the House found that the lessees knew what they were getting into.

> WHEREAS, if, at the conclusion of the present leases, lessees choose not to renew their leases or are not offered the opportunity to renew their leases, they will have spent their own moneys to improve state lands; and
>
> WHEREAS, it may be costly and difficult to remove these permanent improvements, and questions are sure to arise as to the responsibility for such action; and WHEREAS, while the legislature finds that all of these conditions were known and accepted at the time that these

> leases were consummated, it is fair and equitable that these lessees be able to recover the costs of their improvements that have added value to their leased properties

Emphasis added.

103. Among other things H.R. 111 asked the Board to "consider repealing the provision in the existing leases which requires the surrender of the improvements by the lessees to the State." The Board did not do so.

104. As did the legislature, this court also believes and finds that the 1985 lessees knew and accepted all the conditions of the leases at the time they were consummated, including the condition that the State owned the cabins at the end of the lease and lessees would not receive compensation for the cabins.

105. Plaintiff Frank Hay also admitted that the terms of the lease do not admit of 24 compensation for the cabins in a March 2, 1999, letter that Mr. Hay wrote to the then Park Division administrator. Exhibit J155, pages 1-2.

106. The court believes and finds that all parties to this lawsuit who bid or executed the 1985 lease understood, intended, and agreed at the time they bid and at the time they executed the 1985 leases that at the end of the lease term the State would

own all improvements, including the cabins, and that the State would not compensate lessees for the cabins.

107. The intention and understanding of persons to whom the original 1985 lessees assigned the leases is not relevant and does not change the meaning of the 1985 leases.

108. The 1985 leases do not contain any provision specifically stating that the State will not pay just compensation to lessees at the end of the lease. The 1985 leases do not contain any provision specifically stating that the State will pay just compensation to lessees at the end of the lease.

109. There is no provision in the leases specifically addressing just compensation, because the parties understood, intended, and agreed that at the end of the lease term the State would own all improvements, including the cabins. A provision stating that the State would not pay just compensation to lessees for cabins that lessees did not own anyway would have been superfluous and unnecessary.

110. Plaintiffs' witnesses both testified that under their interpretation of the 1985 leases, paragraphs 3 on page 4, 9 on page 8, and 31 on page 20 cannot be reconciled and cannot all be given effect.

111. It is the State's intention to re-lease the lots at issue after expiration of the leases and the holdover but not before. The State is in no way interfering with plaintiffs' interest in the cabins during the term of the lease. The State does not intend to extend or renew plaintiffs' leases.

112. Some, but not all, plaintiffs submitted a Conservation District Use Application to the DLNR seeking permission, as required by Haw. Rev. Stat. chapter 183C, to remove the cabins. Stipulated Facts 120.

113. Each plaintiff that submitted an application has been granted a Conservation District Use Permit authorizing him or her to remove the cabin. Stipulation in open court.

114. It would be physically impossible to relocate many of the cabins at issue from their current location without effectively destroying them. The cost to dismantle and move each of the cabins at issue, that can be relocated, would near, exceed or equal the 2006 tax-assessed value of said cabins, pursuant to County of Kauai tax assessments. None of the cabins at issue in this case could be relocated outside of Koke'e without sustaining significant physical damage to the cabins. Stipulated Facts 115, 116, and 118.

115. The parties disagree as to the fair market value of the cabins at Koke'e. The State believes that fair market value must take into account the

present location of the cabins and the terms of the lease and holdover, including its anticipated termination as of December 31, 2006. The State believes the fair market value may presently be zero or nearly zero. Plaintiffs believe the fair market value may be more than the tax assessed value. Notwithstanding the disagreement and without prejudice to each parties' position as to fair market value, the parties agree that the cost to dismantle and move each of the cabins at issue, that can be relocated, would near, exceed or equal the fair market value of said cabins. Stipulated Fact 117.

116. However, these issues need not be fully resolved and are not relevant to the issue at hand. Plaintiffs' property rights in the cabins end at the end of the leases. The State, as lessor, is willing to allow plaintiffs to remove the cabins. Whether or not plaintiffs choose to or can avail themselves of this option does not affect the fact that their property rights end with the leases.

117. At its meeting on September 9, 2005, the Board voted to negotiate directly with 1985 lessees of lots "that are of high historical value (Categories 4 and 5)," to allow 1985 lessees to the "opportunity to match the highest bidder in order to retain his/her cabin," and to require that any new lessee through the auction "pay the former lessee the assessed value of the improvements." Exhibit J176.

118. All these actions were expressly subject to approval by the Department of the Attorney General. Exhibit J176.

119. The Department of Attorney General did not approve the Board's actions of September 9,2005. Exhibit J176. Accordingly on February 10,2006, the Board re-visited the issue and decided to re-let all lots at issue in this case by auction. Exhibit J176.

120. Between September 2005 and February 2006, Donn Carswell performed repairs or maintenance of the cabin on Koke'e Camp Site Lot 61. Testimony of Frank Hay. There is no evidence that this work was done in reliance on the Board's action in September 2005 and no evidence that any such reliance was or could have been reasonable, especially because the Board's actions were expressly subject to approval by the Department of the Attorney General.

121. Between September 2005 and February 2006, Frank Hay performed repairs or maintenance of the cabin on Koke'e Camp Site Lot 38. Testimony of Frank Hay. Mr. Hay did not testify that he did this work in reliance on the Board's action in September 2005 and there is no evidence of that. Mr. Hay knew the Board's actions were expressly subject to approval by the Department of the Attorney General and could not, therefore, have reasonably relied on the Board's actions in September 2006.

122. Incumbent lessees did not own the cabins at the end of the 1965 leases. Exhibit 132. Incumbent lessees knew they did not own the cabins at the end of the 1965 leases. Testimony of Frank Hay.

123. No incumbent lessee or new bidder was forced to bid at the 1985 auction.

124. No incumbent lessee or new bidder was forced to give up any existing right in order to bid at the 1985 auction or enter into a 1985 lease. Exhibits J115, 117, J121, and J122. Incumbent lessees had a pending lawsuit against the State. Exhibit 194. That lawsuit was not dismissed until October 1986, long after successful bidders signed the 1985 lease. Stipulation in open court.

125. Any finding of fact that is or should be a conclusion of law is to be taken as such notwithstanding its denomination as a finding of fact.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this case and over the State to the extent allowed by law.

2. Inverse condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his

property when condemnation proceedings have not been instituted. It is a cause of action against the government to recover the value of property taken by the government without formal exercise of the power of eminent domain." Moden v. U.S., 404 F.3d 1335, 1342 (Fed. Cir. 2005) (citations omitted).

3. Plaintiffs' claim against the State for just compensation is an inverse condemnation action. This claim is not barred by the State's sovereign immunity. State's Answer to Second Amended Complaint paragraph 78 (answer filed October 10, 2006).

4. The Takings Clause of the Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation.11 The parallel provision in the Hawai'i Constitution is Article I, sec. 20: "Private property shall not be taken or damaged for public use without just compensation."

5. Thus the threshold question in any taking case, including an inverse condemnation case, is whether "private property" is at issue. As the Supreme Court put it in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

6. Similarly, in Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. See also Maritrans Inc. v. U.S., 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the claimant has established a 'property interest' for purposes of the Fifth Amendment"); Conti v. U.S., 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking. 11); Raceway Park, Inc. v. Ohio, 356 F.3d 677,683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place. 11); Colvin Cattle Co., Inc. v. U.S., 2006 WL 3085559, *2 (Fed. Cir. 2006) (the "threshold inquiry is whether the claimant has established a property interest for purposes of the Fifth Amendment.") (citations omitted).

7. The question of whether plaintiffs have any private property that is being or can be taken depends on the terms of the lease. Colvin Cattle Co., Inc. v. U.S., 2006 WL 3085559, *2 (Fed. Cir. 2006):

> In deciding this question, [whether the property interest exists] we do not rely on the Constitution alone because it "neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Maritrans Inc.* v. *United States*, 342 F.3d 1344, 1352 (Fed.Cir.2003) (citations omitted). We also look to " 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, [to] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Id.* (citing *Lucas*, 505 U.S. at 1030).

See also Board of Regents of State Colleges v. Roth, 408 U.S. 564,577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); U.S. v. Rodgers, 461 U.S. 677, 683 (1983) ("although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law. ")

8. "[A]s a general rule, the construction and legal effect to be given a contract is a question of alaw.' *Hanagami* v. *China Airlines*, Ltd., 67 Haw. 357, 364, 688 P.2d 1139, 1144 (1984) (citations omitted)... .[A]bsent an ambiguity, [the] contract terms should be interpreted according to their plain, ordinary, and accepted sense in common speech.' *Cho Mark Oriental Food, Ltd v. K & K Int'l*, 73 Haw. 509, 520, 836 P.2d 1057, 1064 (1992) (citation omitted)." Foundation Intern., Inc. v. E.T. Ige Const., Inc., 102 Hawai'i 487, 494-495, 78 P.3d 23,30-31 (2003).

9. "A lease is reviewed under the principles of contract law when the issue involves the interpretation of a lease provision." Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc., 107 Hawai'i 423, 429, 114 P.3d 929, 935 (Hawai'i App. 2005). Accord Cho Mark Oriental Food, Ltd. v. K & K Intern., 73 Haw. 509, 519, 836 P.2d 1057, 1063 (1992).

10. To determine whether ambiguity exists, the Hawai'i Supreme Court has said that "the test lies not necessarily in the presence of particular ambiguous words or phrases but rather in the purport of the document itself, whether or not particular words or phrases in themselves be uncertain or doubtful in meaning." Foundation Intern., Inc. v. E.T. Ige Const., Inc., 102 Hawai'i 487,496-497, 78 P.3d 23,32-33 (2003) (citations omitted).

11. A contract term or phrase is ambiguous only if it is capable of being reasonably understood in more than one way. Cho Mark Oriental Food, Ltd. v. K & K Int'l, 73 Haw. 509, 520,836 P.2d 1057, 1063-64 (1992). The parties' disagreement over the meaning of a contract's terms does not render clear language ambiguous. Found. Intern., Inc., 102 Hawai'i at 497, 78 P.3d at 33.

12. Put differently, ambiguity exists "only when the contract taken as a whole, is reasonably subject to differing interpretation. A court must respect the plain terms of the policy and not create ambiguity where none exists." State Farm Mut. Auto. Ins. Co. v. Fermahin, 73 Haw. at 556-557,836 P.2d at 1077 (citations and quotation marks omitted).

13. "Nor does ambiguity exist where one party's view strains the contract language beyond its reasonable and ordinary meaning." Seiden Assocs., Inc. v. ANC Holdings, Inc., 959 F.2d 425, 428 (2d Cir.1992) (quotation marks and brackets omitted).

14. "The court should look no further than the four comers of the document to determine whether an ambiguity exists." State Farm Fire and Cas. Co. v. Pacific Rent-All Inc., 90 Hawai'i 315,324,978 P.2d 753, 762 (1999).

15. Under the parol evidence rule, the court

may not resort to extrinsic evidence to determine the parties' intent where the contract's language is unambiguous. Amfac, Inc. v. Waikiki Beachcomber Inc.. Co., 74 Haw. 85,124-25,839 P.2d 10, 31 (1992).

16. "When an ambiguity exists so that there is some doubt as to the intent of the parties, intent is a question for the trier of fact... In the absence of any ambiguity, a question of construction arising upon the face of the instrument is for the court to decide." Foundation Intern., Inc. v. E.T. Ige Const., Inc., 102 Hawai'i 487, 497, 78 P.3d 23,33 (2003).

17. "[I] is well settled that the purely subjective, or secret, intent of a party in assenting is irrelevant in an inquiry into the contractual intent of the parties. *Standard Management, Inc.* v. *Kekona,* 99 Hawai'i 125, 134,53 P.3d 264,273 (App.2001)." Stanford Carr Development Corp. v. Unity House, Inc., 111 Hawai'j 286, 298, 141 P.3d 459, 471 (2006). Cf. U. S. for Use and Benefit of Union Bldg. Materials Corp. v. Haas & Haynie Corp., 577 F.2d 568,573 (9th Cir. 1978) ("if only one party knows or has reason to know of the conflict in meaning, the contract will be interpreted in favor of the party who does not know of the conflict.")

18. Both parties contended in their cross motions for summary judgment that the 1985 leases are unambiguous, although of course, each

contended that it was unambiguous in their favor. The court believed at the time that it would benefit from a fuller understanding of the facts and issues and denied both motions.

19. "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing - - that the case should go to trial." Switzerland Cheese Ass'n Inc. v. E. Home's Market, Inc., 385 U.S. 23, 25 (1966). 20.

20. The court did benefit from additional briefing and a fuller understanding of the background of this case. Based on this fuller understanding, the court now determines and concludes that the leases are unambiguous.

21. As extended by the holdover, each 1985 lease expires on December 31, 2006.

22. Each of the leases contained the following provisions especially relevant to this case.

23. Paragraph 9 on page 8 specifically says that upon expiration of the lease the State owns the cabins and all other leasehold improvements:

> 9. Improvements. [The parties agree] That the Lessee shall not at any

> time during said term construct, place, maintain and install on said premises any building, structure or improvement of any kind and description whatsoever except with the prior approval of the Board and upon such conditions the Board may impose, including the requirement that such building, structure or improvement be constructed of new materials only. The ownership thereof shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor.
>
> The Board reserves the right to limit the number of dwellings on the premises.

Emphasis added.

24. Paragraph 31 on page 20 requires the lessees to surrender the premises together with all improvements to the State at the end of the lease:

> 31. Surrender. [The parties agree] That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with

> all improvements existing or constructed thereon unless otherwise provided. The Lessor may, at its option, on or about the end of the lease elect to retain the improvements or require the Lessee, at the Lessee's own expense, to remove such improvements and restore the premises to a condition satisfactory to the Lessor. [A second paragraph relating to removal of personal property and vehicles is omitted]

25. Paragraph 21 on page 14 ensures the same result (State owns the cabins) if the lease is terminated for breach before the end of the term. It provides that upon termination for breach "all buildings and improvements thereon shall remain and become the property of the Lessor."

26. Paragraph 34 on page 21 requires plaintiffs to maintain fire insurance on the cabins "in the joint names of Lessor [and] Lessee." If a cabin burns down, lessee is to use the proceeds to rebuild. However, paragraph 34 also allows a lessee to surrender the lease instead of rebuilding. In that event:

> [T]he Lessee shall then receive that portion of the proceeds which the unexpired term of this lease at the time of said loss or damage bears to

the whole of said term, the Lessor to retain the balance of said proceeds.

In other words, if a cabin were to burn down at the end of the 19th year of the lease, lessee could surrender the lease and receive five percent (1/20) of the insurance proceeds. The lion's share (95%) of the proceeds would go to the State. If a cabin burned downed the day before the lease ended, lessee would get none of the proceeds.

27. Similarly, paragraph 23 on page 16 provides that if the property is condemned, a lessee is entitled to receive from the condemning authority lithe proportionate value of the Lessee's 34 "permanent improvements so taken in the proportion that it bears to the unexpired term of the lease." In the alternative, lessee can remove or relocate the improvements.

28. Paragraph 3 on page 4 reserves to the State:

> 3. Ownership of fixed improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater systems(s) located on the land prior to or on the commencement date of this lease, excluding (l) any recreation-residence cabin, building or

> structure existing on the premises prior to the commencement date of this lease which is not owned by Lessor and which has been purchased or acquired by Lessee(s) from the former occupant(s) of the premises and (2) those improvements constructed during the term of this lease, unless provided otherwise."

29. As a matter of law, the court finds that these provisions "taken and a whole" and "interpreted according to their plain, ordinary, and accepted sense in common speech" are not "reasonably subject to differing interpretation." The 1985 leases are unambiguous and unambiguously state and mean that all improvements, including the cabins, belong to the State at the end of the lease term.

30. Paragraph 3 on page 4 reserves rights in improvements other than the cabins to the State. The paragraph does not apply to the cabins and, therefore, does not conflict with paragraphs that do apply to the cabins.

31. All the relevant language means exactly what it plainly says: plaintiffs own the cabins during the term of the lease, but at the end of the lease plaintiffs are required to surrender the improvements to the State and thereafter ownership vests in the State. There is nothing

vague or ambiguous about this language.

32. This interpretation is consistent with and bolstered by the common law of the State of Hawai'i. As the Hawai'i Supreme Court explained in Anthony v. Kualoa Ranch, Inc., 69 Haw. 112, 119, 736 P.2d 55, 60 (1987):

> The law of Hawaii in 1953, when the lease was executed, was that a house built upon premises owned by another became a fixture and part of the realty *(Ahoi* v. *Pacheco,* 22 Haw. 257 (1914)), and a tenant's right to remove such a house if provided for in the lease, had to be exercised in accordance with the terms of the lease. *Akiona* v. *Kohala Sugar Co.,* 5 Haw. 359 (1885). The lease in question, when executed, provided exactly what the law of Hawaii, as pronounced by this court, recognized.

69 Haw. at 119, 736 P.2d at 60. See also Pioneer Mill Co. v. Ward, 34 Haw. 686 (1938) (examining a lease that required lessee "at the end or earlier determination of this term to peaceably quit and surrender the demised premises with the improvements to the said Lessors or their representatives" and holding that "Pursuant to this term, the fee owners owned the improvements as well.") Maguire v. Gomes, 17 Haw. 493 (1906).

33. This common law remains the same to the present as to Koke'e. Haw. Rev. Stat. § 516-70 as modified by section 19 of Act 184, 1975 Hawai'i Session Laws at 418 is not applicable to the leases at Koke'e, because Koke'e is not residential land and the cabins are not plaintiffs' residences.

34. "[I]t is a general rule that the existing law is part of a contract where there is no stipulation to the contrary." Quedding v. Arisumi Bros.,Inc., 66 Haw. 335, 338, 661 P.2d 706, 709 (1983) (citation omitted).

35. Even if the court were to conclude that the leases are ambiguous, the court would reach the same conclusion.

36. If the leases are treated as ambiguous, then "parol evidence regarding the parties' intent as to the language used in a contract may be considered." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 124-125,839 P.2d 10, 31 (1992).

37. "[I]n construing a contract, a court's principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen." Brown v. KFC National Management Co., 82 Hawai'i 226, 240, 921 P.2d 146, 160 (1996) (citation omitted).

38. The meaning of a contract and the intent of the parties are viewed as of the time it was made and not in light of subsequent events. Texas v. American Tobacco Co., 463 F.3d 399, 407 ,(5th Cir. 2006). In this case, that also means that the intent of the original parties is the relevant issue. The meaning of the leases cannot change just because the original lessees assigned the leases.

39. The court should construe the lease such that each provision of the lease is given meaning. And preference should be given to an interpretation that harmonizes and gives meaning to all the terms of the lease. Stanford Carr Development Corp. v. Unity House, Inc., 111 Hawai'i 286, 297-298, 141 P.3d 459,470-471 (2006).

40. The State's interpretation is the natural reading of the lease, honors the plain meaning of the words, harmonizes all the relevant provisions, and gives meaning to all the provisions. Plaintiffs' interpretation strains to find a conflict where none exists, would require that at least some provisions of the lease be ignored or given no effect, would require the court to ignore evidence, and would require the court to find that the 1985 leases has a different meaning for different lessees.

41. Based on the factual findings noted above, the court concludes (even if the leases are

ambiguous) that the parties understood, intended, and agreed that at the end of the lease term the State would own all improvements, including the cabins, and that the State would not compensate lessees for the cabins.

42. It follows that lessees have no "private property" that is or can be either taken or damaged. There is no taking and the State is not required to pay just compensation to plaintiffs.

43. In this case, the State through the Board is acting as a landlord, i.e. in its proprietary rather than its governmental capacity. The State is to be treated as other would other landlords in analogous situations. The 1985 lease is governed generally by the law applicable to leases between private individuals. Sharma v. State, Dept. of Land and Natural Resources, 66 Haw. 632,637,673 P.2d 1030, 1033 (1983).

44. The court also rejects any contention that the terms of the 1985 lease effect a taking. No one, including the incumbent 1965 lessees, was required to bid at the 1985 auction or enter into the 1985 leases. In general, persons holding the leasehold interest in the 1965 leases who were not successful bidders were paid for their cabins by the successful bidders. Those persons also had a pending lawsuit to enforce their claimed rights.

45. Based on the findings entered above, all persons bidding at the 1985 auction were aware

of its terms and voluntarily entered into the bidding process and the leases.

46. The theory of unconstitutional condition is not applicable in this case. No one gave up or was required to give up any constitutionally protected interest in order to bid at the 1985 auction or enter in a 1985 lease.

47. If any condition relating to the 1985 lease was unconstitutional, then the claim accrued 38 in 1985, Daniel v. County of Santa Barbara, 288 F.3d 375,383 (9th Cir. 2002), and is now time barred. Haw. Rev. Stat. § 661-5 (1993) and Haw. Rev. Stat. § 662-4 (1993).

48. There is no issue in this case as to whether plaintiffs waived any right to just compensation. Pursuant to the terms of the leases and for the reasons stated herein, plaintiffs do not have such a right and neither can nor need to waive such a non-existent right.

49. There would be no reason for the 1985 leases to mention just compensation, which could not be owed. The parties' silence on the issue cannot, as a matter of law, be taken to create an ambiguity. Gardiner, Kamya & Associates, P.C. v. Jackson, 2006 WL 3208859, *5 (Fed.Ct. 2006); New Jersey v. New York, 523 U.S. 767, 783 n. 6, (1998); Nissho Iwai Europe PLC v. Korea First Bank, 99 N.Y.2d 115, 122, 782 N.E.2d 55, 60, 752 N.Y.S.2d 259,264 (2002); AMJUR CONTRACTS §

331.

50. Any plaintiff who wishes to remove or demolish a cabin must obtain a Conservation District Use Permit in order to do so. Haw. Rev. Stat. chapter 183C.

51. The alleged "unfairness" of the leases, including the fact that removal of the cabins is or may be difficulty, uneconomical, or even impossible does not allow plaintiffs to ignore their agreement and does not give this court the right to re-write the lease, in the guise of "just compensation" or otherwise. See Strouss v. Simmons, 66 Haw. 32,40,657 P.2d 1004, 1010 (1982) ("It is the function of courts to construe and enforce contracts made by the parties, not to make or alter them."). See Stanford Carr Development Corp. v. Unity House, Inc., 111 Hawai'i 286,301, 141 P.3d 459, 474 (2006).

52. "The theory of equitable estoppel requires proof that one person willfully caused another person to erroneously believe a certain state of things, and that person reasonably relied on this erroneous belief to his or her detriment." Maria v. Freitas, 73 Haw. 266, 273,832 P.2d 259,264 (1992).

53. "Under the theory of quasi-estoppel, a party is precluded from asserting to another's disadvantage, a right inconsistent with a position previously taken by him." Id. 73 Haw. at 274, 832

P.2d at 264.

54. The theories have limited application to the State. Under Hawai'i case law, a past mistake or improper action does not force the State, by estoppel, to continue making the same mistake in the future. The application of the doctrine of equitable estoppel against the government is not favored. Turner v. Chandler, 87 Hawai'i 330,955 P.2d 1062 (Haw.App. 1998).

55. Granting of a benefit in the past does not create a right to the benefit in the future. Cassidy v. State of Hawaii Dept. of Transp., Harbors Div., 915 F.2d 528 (9th Cir. 1990).

56. The theories of equitable estoppel and quasi-estoppel are not applicable in this case and do not require payment of just compensation.

57. Any conclusion of law that is or should be a finding of fact is to be taken as such notwithstanding its denomination as a conclusion of law.

ORDER

Based on the above Findings of Fact and Conclusions of Law, and for any other good or sufficient reason shown in the record, the Court hereby orders, declares, and decrees that expiration of the 1985 leases and the State's plan to re-lease the lots after expiration is not a constitutional taking of the cabins and that just compensation is not required. Further

proceedings in this matter shall be consistent with these findings, conclusions, and order.

DATED: Lihue, Hawai'i, December 18, 2006

SEAL s/ Kathleen N.A. Watanabe

KATHLEEN N.A. WATANABE

Judge of the Above-Entitled Court

NOT FOR PUBLICATION

NO. 28730

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

DONN CARSWELL, GALE CARSWELL, FRANK O. HAY, PAUL T. MATSUNAGA, ARLINE Y. MATSUNAGA, LINDA M. ALIMBAYOGUEN, PETER BECKERMAN, PETER K. BALDWIN, SAMUEL BLAIR, PAULETTE BURTNER, JOEL CAVASSO, ERIK P. COOPERSMITH, FRANK W.N. COX, VIRGINIA M.H. DUNAS, ELIZABETH DUNFORD, GLENN HONTZ, WAYNE JACINTHO, CRYSTAL S. JONES, RICHARD C. JONES, DAVID KOCH, LEALANI CORPORATION, JOANN GIVENS, MICHAEL GIVENS, BASIL L. MAYO, SHERILL E. MILLER, BARBARA PUTZIER, KARL RAMIREZ, PATRICIA SHEEHAN, ROBERT T. SWENEY, VICKY TAYLOR, A.J. TOULON, JR., ELIZABETH TOULON, WAIMEA GARAGE, LTD., CECILIA A. WILLIAMS, HARWOOD D. WILLIAMSON, NANCY H. WILLIAMSON, CYNTHIA WILSON, JAMES WILSON, WAIYEE CARMEN WONG, AND DOES 1-94,

Plaintiffs-Appellants,

and

PAUL KYNO AND CRAIG WISEN,

Plaintiffs-Appellees,

v.

DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I; INDIVIDUAL DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, AND DOE ENTITIES I-IO

Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 06-1-0049)
(Filed May 22, 2009)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Plaintiffs-Appellants Donn Carswell, Gale Carswell, Frank O. Hay, Paul T. Matsunaga, Arline Y. Matsunaga, Linda M. Alimbayoguen, Peter Beckerman, Peter K. Baldwin, Samuel Blair, Paulette Burtner, Joel Cavasso, Erik P. Coopersmith, Frank W.N. Cox, Virginia M.H. Dunas, Elizabeth Dunford, Glenn Hontz, Wayne Jacintho, Crystal S. Jones, Richard C. Jones, David Koch, Lealani Corporation, Joann Givens, Michael Givens, Basil L. Mayo, Sherill E. Miller, Barbara Putzier, Karl Ramirez, Patricia Sheehan, Robert T. Sweney, Vicky Taylor, A.J. Toulon, Jr., Elizabeth Toulon, Waimea Garage Ltd., Cecilia A.

Williams, Harwood D. Williamson, Nancy H. Williamson, Cynthia Wilson, James Wilson, and Waiyee Carmen Wong (collectively/ Plaintiffs) appeal from the Stipulation for Dismissal Without Prejudice of Count Two of Second Amended Complaint and For Entry of Judgment (Stipulation for Dismissal) and the Final Judgment [1] filed on August 15, 2007 in the Circuit Court of the Fifth Circuit (circuit court).

The circuit court entered judgment in favor of the Department of Land and Natural Resources, State of Hawai'i (the DLNR) and against Plaintiffs on Counts One (declaratory relief) and Three (reverse condemnation [2]) of the Second Amended Complaint, and the parties stipulated to dismiss Count Two

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[1] The Honorable Kathleen N.A. Watanabe presided. The Final Judgment is attached as "Exhibit A" to the Stipulation for Dismissal and is signed by Judge Watanabe. Because the Final Judgment resolves all claims against all parties/ we consider it a "separate document" under Hawai'i Rules of Civil Procedure Rule 58 and hold that it satisfies the requirements for an appealable final judgment under HRS § 641-1 (a) (Supp 2008).

[2] "Reverse" or "inverse" condemnation is a "shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. It is a cause of action against the government to recover the value of property taken by the government without formal exercise of the power of eminent domain." Moden v. United States, 404 F.3d 1335, 1342 (Fed. Cir. 2005) (internal quotation marks and citations omitted)

(taking of property) of the Second Amended Complaint.

On appeal, Plaintiffs argue the following:

1. The circuit court reversibly erred when it found that the State of Hawai'i (the State) need not obtain a citizen's waiver of a fundamental constitutional right before forcing a citizen to surrender that right as a condition of contracting with the State whenever the State acts in the capacity of a landlord. Related to this contention is Plaintiffs' claim that Conclusion of Law (COL) 43 of the circuit court's December 18, 2006 "Findings of Fact/ Conclusions of Law; Order" (FOF/COL/Order) is wrong.

2. The circuit court abused its discretion and clearly erred in finding in Finding of Fact (FOF) 122 [1] that Plaintiffs lost their property rights in their cabins in 1985, when the admissions, stipulations, and evidence were all to the contrary.

3. The circuit court reversibly erred and abused its discretion when it found that the State had not violated the doctrine of "unconstitutional conditions." Related to this argument is Plaintiffs' contention that COLs 44 and 46 are wrong.

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[1] In the "Points of Error" section of their opening brief, Plaintiffs refer to "Conclusion of Law 122" when they clearly mean "FOF 122." The FOF/COL/Order contains no COL 122.

4. The circuit court erred by failing to rule on Plaintiffs' claim that the "surrender" provision of recreational-residential leases they won at auction in 1985 (the 1985 Leases) was an unenforceable contract term, unsupported by consideration, if applied to the cabins.

5. The circuit court erred as a matter of law by finding that the surrender provision in the 1985 Leases is not ambiguous in favor of the State.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Plaintiffs' points of error as follows:

1) The circuit court did not reversibly err when it found the State did not need to obtain Plaintiffs' waiver of their constitutional right to just compensation before claiming the cabins on Plaintiffs' leased lots because according to the unambiguous language of the 1985 Leases particularly the "Surrender" provision -- Plaintiffs had no such constitutional right. See Raceway Park, Inc. v. Ohio, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place."); Kepoo v. Kane, 106 Hawai'i 270, 294, 103 P.3d 939, 963 (2005) (internal quotation marks and citation omitted) ("To succeed on a takings claim, a claimant must

first establish a vested interest protectable under the Fifth Amendment. ") ; Joy A. McElroy, M. D., Inc. v. Maryl Group r Inc., 107 Hawai'i 423,430,114 P.3d 929,936 (App. 2005) ("The intention of the parties is to be gathered from the whole instrument.") COL 43 is not wrong.

2) The circuit court did not abuse its discretion or clearly err in finding in FOF 122 that incumbent lessees did not have property rights in their cabins at the end of the 1965 lease terms. The "Surrender" provision of the 1965 leases, like the "Surrender" provision of the 1985 Leases, plainly reveals that incumbent lessees did not own the cabins at the end of the lease term. The circuit court did not clearly err by finding that incumbent lessees did not own the cabins at the end of the 1965 lease terms. With regard to Plaintiffs' argument that "the admissions, stipulations, and evidence were all to the contrary," we note that "it is within the province of the trier of fact to weigh the evidence and to assess the credibility of the witnesses, and this court will refrain from interfering in those determinations." Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 117-18, 58 P.3d 608, 628-29 (2002) (internal quotation marks and citation omitted).

3) The circuit court did not reversibly err or abuse its discretion when it found that the State did not violate the doctrine of "unconstitutional conditions" because, as we have

already held, the court rightly found that incumbent lessees did not own the cabins at the end of the 1965 lease terms. Hence, those plaintiffs did not have a right to compensation to preserve by successfully bidding at the 1985 auction. See Nakamoto v. Fasi, 64 Haw. 17, 22, 635 P.2d 946, 951-52 (1981) (internal quotation marks and citation omitted) (holding that "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution"). COLs 44 and 36 are not wrong.

4) Without addressing whether the circuit court erred by failing to rule on Plaintiffs' claim that the "Surrender" provision of the 1985 Leases was an unenforceable contract term, unsupported by consideration, such error was harmless because the 1985 Leases contained numerous promises by the State and return promises by the lessee. See Douglass v. Pflueger Hawaii, Inc, 110 Hawai'i 520, 534, 135 P.3d 129,143 (2006) (quoting Shanghai Inv. Co. v. Alteka Co., 92 Hawai'i 482, 496, 993 P.2d 516, 530 (2000)) ("Consideration is defined as a bargained for exchange whereby the promisor receives some benefit and the promisee suffers a detriment.").

5) The circuit court did not err as a matter of law by finding that the "Surrender"

clause in the 1985 Leases is unambiguous in favor of the State. The circuit court's findings in COLs 29 and 31 are grounded within the four corners of the lease and conform to the principle that a contract must be "construed as a whole." See McElroy, 107, Hawai'i at 430, 114 P.3d at 936. The circuit court's interpretation honors the individual lease terms and maintains the consistency of each provision with the others. See, e.g., Stanford Carr Dev. Corp. v. Unity House,' Inc., 111 Hawai'i 286, 297, 141 P.3d 459, 470 (2006) (noting that the Hawai'i Supreme Court has long expressed its disapproval of interpreting a contract so as to render any clause meaningless).

6) Further, the circuit court's conclusion that Plaintiffs had an ownership interest in the cabins only during the 20-year term of the lease and had no interest in the cabins at the expiration of the lease is confirmed by the lease provisions that apportioned monies between the State and the lessee based on the remaining duration of the lease. Therefore,

IT IS HEREBY ORDERED that the Stipulation for Dismissal Without Prejudice of Count Two of Second Amended Complaint and For Entry of Judgment and the Final Judgment filed on August 15, 2007 in the Circuit Court of the Fifth Circuit are affirmed.

DATED: Honolulu, Hawai'i, May 22, 2009.

/s/ _____
Presiding Judge

/s/ _____
Associate Judge

/s/ _____
Associate Judge

On the briefs:
Daniel G. Hempey
Hempey & Meyers, LLp
for Plaintiffs-Appellants.
Dorothy Sellers,
Solicitor General, Dept.
of the Attorney General,
for Defendant-Appellee

NO. 28730

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

DONN CARSWELL, GALE CARSWELL, FRANK O. HAY, PAUL T. MATSUNAGA, ARLINE Y. MATSUNAGA, LINDA M. ALIMBAYOGUEN, PETER BECKERMAN, PETER K. BALDWIN, SAMUEL BLAIR, PAULETTE BURTNER, JOEL CAVASSO, ERIK P. COOPERSMITH, FRANK W.N. COX, VIRGINIA M.H. DUNAS, ELIZABETH DUNFORD, GLENN HONTZ, WAYNE JACINTHO, CRYSTAL S. JONES, RICHARD C. JONES,

DAVID KOCH, LEALANI CORPORATION, JOANN GIVENS, MICHAEL GIVENS, BASIL L. MAYO, SHERILL E. MILLER, BARBARA PUTZIER, KARL RAMIREZ, PATRICIA SHEEHAN, ROBERT T. SWENEY, VICKY TAYLOR, A.J. TOULON, JR., ELIZABETH TOULON, WAIMEA GARAGE, LTD., CECILIA A. WILLIAMS, HARWOOD D. WILLIAMSON, NANCY H. WILLIAMSON, CYNTHIA WILSON, JAMES WILSON, WAIYEE CARMEN WONG, AND DOES 1-94,

Petitioners/Plaintiffs-Appellants,

vs.

DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I; INDIVIDUAL DOES 1-10, DOE

PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, AND DOE ENTITIES I-10
Respondents/Defendants-Appellees

CERTIORARI TO THE INTERMEDIATE COURT OF APPEAL
(CIV. NO. 06-1-0049)
(Filed June 12, 2009)

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI
(By: Duffy, J. for the court[1])

PETITIONERS/PLAINTIFFS-APPELLANTS' APPLICATION FOR WRIT OF CERTIORARI, FILED ON SEPTEMBER 9, 2009, IS HEREBY REJECTED.

DATED: Honolulu, Hawai'i, October 12, 2009.

FOR THE COURT: /s/
Associate Justice

SEAL: Appellate Courts, State of Hawai'i

Daniel G. Hempey
For Petitioners/Plaintiffs-Appellants on the application

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[1] Considered by: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT STATE OF HAWAI'I

DONN CARSWELL, et al. Plaintiffs, vs. DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I, INDIVIDUAL DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10 AND DOE ENTITIES 1-10, Defendants.	CIVIL NO. 06-1-0049 (Injunctive Relief) (Declaratory Judgment) STIPULATED FACTS TRIAL WEEK: NOVEMBER 20, 2006 JUDGE: KATHLEEN N A. WATANABE

STIPULATED FACTS

(Filed October 30, 2006)

It is hereby stipulated and agreed by the parties hereto, through counsel, that the following facts are true for purposes of this proceeding and any appeal.

BACKGROUND FACTS

1. Each joint exhibit shall be received into evidence without objection and counsel may argue as to the weight to be given said exhibits.

2. Each document entered jointly into evidence was sent by the person it purports to have been sent by, on or about the date it purports to have been sent, and received by the person to whom it purports to have been sent.

3. This case concerns recreational-residential leases of lots at Koke'e State Park and Waimea Canyon State Park on the Island of Kauai. For convenience the parks and the general area are collectively referred to as "Koke'e." The State of Hawai'i owns the land at Koke'e, including the leased lots.

4. Lots at Koke'e have been used for recreational-residential purposes since at least the early 20th century.

5. In November 1919, the then Governor of the Territory set aside land at Koke'e to the County of Kauai for use as the Pu'u Ka Pele County Park. Exhibit J3. The Governor set aside additional land for the Park in 1923. Exhibit J4.

6. Thereafter both the Territory of Hawai'i and the County of Kauai issued recreational-

residential permits in the area. The County permits covered lots in Pu'u Ka Pele County Park. The Territorial permits covered lots in Halemanu Camp Lots and Koke'e Camp Lots. The general area is pictured in Exhibit J1.

7. Lots in or formerly in Pu'u Ka Pele County Park are referred to as "Pu'u Ka Pele Park Lot ___."

8. Lots in either Koke'e Camp or Halemanu Camp are referred to as "Koke'e Camp Site Lot ___."

9. A portion of the Territory's original form of permit back in 1918 is in evidence as Exhibit J2.

10. The County's form of permit during the 1930's is in evidence as Exhibit J5.

11. The County's form of permit as of 1951 is in evidence as Exhibit J6.

12. The Territory's form of permit as of 1951 is in evidence as Exhibit J7. All these permits expired on July 1,1961.

13. At statehood, management of the Territory's lots at Koke'e was transferred to the Board of Land and Natural Resources.

14. On June 28, 1963, the Board authorized issuance of revocable permits, retroactive to July 1, 1961, to occupants of the Koke'e lots or their successors. Exhibit J9. The permits were in the form of Exhibit J10.

15. In 1965, the set aside of land for Pu'u Ka Pele County Park was canceled and the land was returned to the control of the Board. See Exhibit J16.

16. On April 28, 1965, the County and the State jointly notified all holders of permits at Pu'u Ka Pele County Park that the land had been returned to the State and canceling all county permits as of June 30, 1965. Exhibit J18.

17. On May 14, 1965, the Board approved issuance of revocable permits to all occupants at Pu'u Ka Pele who had constructed improvements on the lot. Exhibit J20. The permits were in the form of Exhibit J23.

THE 1965 LEASES

18. On October 22, 1965, and pursuant to a then newly enacted law (now codified as Haw. Rev. Stat. § 171-44), the Board authorized issuing leases by direct negotiation to permittees at Koke'e and Pu'u Ka Pele Park. Exhibit J29.

19. By letter dated November 18,1965, the DLNR notified each permittee of the Board's action. Each such letter was in the form of Exhibit J31.

20. Each of lots at issue in this case was originally leased in 1965 pursuant to that Board action. Each of these original leases had a commencement date of January 1, 1966.

21. Most of these original leases were for a term of 20 years, expiring December 31, 1985. Some, however, were for 15 years, expiring December 31, 1980, and some were for 10 years, expiring December 31, 1975.

22. With respect to the 10 and 15 year leases, the State and the holder of the lessee's interest entered into a new lease expiring on December 31, 1985. See Exhibits J46 and J50.

23. The leases expiring December 31, 1985, and covering the lots at issue in this case are collectively referred to as "the 1965 leases."

24. Each of the 1965 leases (except the lease covering Koke'e Camp Site Lot 51) was n the form of Exhibit J32.

25. The 1965 lease covering Koke'e Camp Site Lot 51 is in evidence as Exhibit J49.

THE 1985 AUCTION AND LEASES

26. In 1985, the BLNR decided that after the 1965 leases expired, it would relet the lots by auction. Exhibits J73 and J75.

27. Before the auction, DLNR sent to each then current holder of the lessee's interest in a 1965 lease the following documents, in evidence:
Letter dated January 9, 1985, Exhibit J69
Letter dated February 13, 1985, Exhibit J80
Letter dated March 1, 1985, Exhibit J85
Letter dated May 7, 1985, Exhibit J89
Letter dated June 6, 1985, Exhibit J93 which letters enclosed Exhibit J90 (Notice of Sale) and J91 (Conduct of Sale)
Letter dated July 9, 1985, Exhibit J98

28. Notice of sale was published in the Honolulu Advertiser, Honolulu Star-Bulletin, and Kauai Garden Isle on June 28, July 5, and July 12, 1985. Exhibit J97.

29. Leases for each of the lots at issue in this case were auctioned by the DLNR in July 1985.

30. At the auction, DLNR's representative, James Detor, stated: "I'd like to reiterate the information that's in the Conduct of Sale documents that with two exceptions today you are bidding on the land only, not on the improvements."

31. Each successful bidder or group of bidders for a 1985 lease signed a Memorandum of Lease Made at Public Auction in the form of Exhibit J99.

32. On September 24 or 25, 1985, DLNR sent to each successful bidder or group of bidders for a 1985 lease a letter in the form of Exhibit J101.

33. On September 26, 1985, DLNR sent to each 1965 lessee who was not a successful bidder for a 1985 lease a letter in the form of Exhibit J103.

34. On or about January 16, 1986, the DLNR sent to each successful bidder or group of bidders for a 1985 lease who had not yet resolved the issue of improvements on the lot a letter in the form of Exhibit J116.

35. Each successful bidder or group of bidders at the July 1985 auction signed a 20-year lease in the form of Exhibit J112. Some of the leases had an effective date of January 1,1986, and expired on December 31, 2005. Some of the leases had an effective date of April 1, 1986, and expired on March 31, 2006. The reasons for the different commencement date had to do with when the successful bidders at the 1985 auction made arrangements as to existing improvements with prior lessees. See Exhibit J101.

36. The leases auctioned in 1985 and covering the lots at issue in this case are collectively referred to as "the 1985 leases."

37. With respect to each of the lots at issue in this case the State and the holders of the lessees' interest in the lease entered into a Holdover of General Lease in the form of Exhibit J167.

38. Each of the current lessees of the lots at issue in this case owns the cabin on the respective lot during the term of the lease and holdover. The parties disagree as to ownership after the end of the leases and holdovers.

39. Each of the following stipulations as to the present "holder of the lessee's interest" in a lease is applicable through December 31, 2006. The State contends that the leases and holdovers terminate as of that date.

FACT AS TO PARTICULAR LOTS AT ISSUE IN THIS CASE

1. Koke'e Camp Site Lot 58

40. Plaintiff Waimea Garage, Limited was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 58 and remains the holder of the lessee's interest in that lease.

41. Waimea Garage, Limited was not the holder of the lessee's interest in the 1965 lease of

that lot. Waimea Garage, Limited separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

2. Pu'u Ka Pele Park Lot 52

42. Plaintiff Paulette Burtner was the successful bidder in 1985 for the lease of Pu'u Ka Pele Park Lot 52 and remains the holder of the lessee's interest in that lease.

43. Paulette Burtner was not the holder of the lessee's interest in the 1965 lease of that lot. Paulette Burtner separately purchased an interest in the improvements on the lot from the holders of the 1965 lease. See Exhibit J114.

3. Pu'u Ka Pele Park Lot 71

44. Plaintiff Robert Taylor Sweney was the successful bidder in 1985 for the lease of Pu'u Ka Pele Park Lot 71 and remains the holder of the lessee's interest in that lease.

45. Robert Taylor Sweney was not the holder of the lessee's interest in the 1965 lease of that lot. Robert Taylor Sweney separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

4. Pu'u Ka Pele Park Lot 35

46. Alfred Steelman et al were the successful bidders in 1985 for the lease of Pu'u Ka Pele Park Lot 35.

47. Alfred Steelman et al were not the holder of the lessee's interest in the 1965 lease of that lot. Alfred Steelman et al separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

48. Plaintiffs Virginia M. H. Dunas and Glen Hontz are the present holders of the lessee's interest in the lease covering Pu'u Ka Pele Park Lot 35. Exhibits J137, J141, and J148.

5. Koke'e Camp Site Lot 51

49. Ted Blake and Edward Schimmelfennig were the successful bidders in 1985 for the lease of Koke' e Camp Site Lot 51.

50. Ted Blake and Edward Schimmelfennig were not the holders of the lessee's interest in the 1965 lease of that lot.

51. Plaintiffs Samuel Blair and Cannen Waiyee Wong claim to be the present holders of the lessees' interest in the lease of Koke'e Camp Site Lot 51.

6. Koke'e Camp Site Lot 47

52. William S. Dunford was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 47. At the time of the auction (July 1985) William S. Dunford was also the holder of the lessee's interest in the 1965 lease of that lot. The

Dunford family were permittees of that lot since at least 1951. Exhibits J7 and J10.

53. Plaintiff Elizabeth Dunford and William S. Dunford are the present holders of the lessee's interest in the lease covering Koke'e Camp Site Lot 47. Exhibit J132.

7. Koke'e Camp Site Lot 85

54. Salvatore M. Bosco was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 85. At the time of the auction (July 1985) Salvatore M. Bosco was also the holder of the lessee's interest in the 1965 lease.

55. Plaintiff Vicky Coxe Taylor and Edward James Taylor are the present holders of the lessee's interest in the lease covering Koke'e Camp Site Lot 85. Exhibit J145.

8. Koke'e Camp Site Lot 86

56. Gerald M. Sanchez was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 86. At the time of the auction (July 1985) Gerald M. Sanchez was also the holder of the lessee's interest in the 1965 lease of that lot.

57. Plaintiffs Richard and Crystal Jones are the present holders of the lessee's interest in the lease of Koke'e Camp Site Lot 86. Exhibit J150.

9. Koke'e Camp Site Lot 89

58. Takashi Veda was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 89.

59. Takashi Veda was not the holder of the lessee's interest in the 1965 lease of that lot.

60. Koke'e Mountain House, Inc. is the present holder of the lessee's interest in the lease covering Koke'e Camp Site Lot 89. Exhibit J125. Plaintiff Basil Mayo is the president of Koke'e Mountain House, Inc.

10. Koke'e Camp Site Lot 81

61. Richard and Elisa C. Vidinha were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 81.

62. Richard and Elisa C. Vidinha were not the holders of the lessee's interest in the1965 lease of that lot.

63. Plaintiff Paul Kyno and Dennis Riker are the present holders of the lessee's interest in the lease of Koke'e Camp Site Lot 81. Exhibit J165.

11. Koke'e Camp Site Lot 84

64. Michael K. Nakaahiki et al were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 84.

65. Michael K. Nakaahiki et al were not the holder of the lessee's interest in the 1965 lease of that lot.

66. Plaintiff Craig Wisen claims to be the present holder of the lessee's interest in the lease covering Koke'e Camp Site Lot 84.

12. Pu'u Ka Pele Park Lot 12

67. Frank W. N. Cox and Aileen S. Cox, Lenore L. Seto, Kaniau K. Torris, and H. Hoover Cox were the successful bidders in 1985 for the lease of Pu'u Ka Pele Park Lot 12.

68. Frank W. N. Cox et al were not the holders of the lessee's interest in the 1965 lease of that lot, but Marie Cox previously held an interest in the lot. See Exhibits J18, J23, and J51. Plaintiff Frank W. N. Cox, Aileen S. Cox, the heirs of Lenore L. Seto, the heirs of Kaniau K. Torris, and H. Hoover Cox are the present holders of the lessee's interest in the lease covering Pu'u Ka Pele Park Lot 12.

13. Koke'e Camp Site Lot 61

69. Plaintiffs Dunn A. and Gale F. Carswell were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 61 and remain the holders of the lessee's interest in that lease.

70. At the time of the auction (July 1985) Donn A. and Gale F. Carswell were also the holders of

the lessee's interest in the 1965 lease of that lot. Exhibits J22, J24, and J26.

14. Koke'e Camp Site Lot 38

71. Plaintiff Frank O. Hay, Jr., was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 38.

72. At the time of the auction (July 1985) Frank O. Hay, Jr., was also the holder of the lessee's interest in the 1965 lease of that lot. Exhibit J48.

15. Koke'e Camp Site Lots 42 and 44

73. Robert L. Miller and plaintiff Dian Ewart Miller were the successful bidders in1985 for the lease of Koke' e Camp Site Lots 42 and 44.

74. At the time of the auction (July 1985) Robert L. Miller and Dian Ewart Miller were also the holders of the lessee's interest in the 1965 lease of that lot. Exhibit J43.

16. Koke'e Camp Site Lot 43

75. Arthur Palama, Lena K. Palama, and Abduladim M. Senussi were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 43.

76. Arthur Palama et al were not the holder of the lessee's interest in the 1965 lease of that lot.

77. The holders of the 1965 lease removed the improvements from the lot. See Exhibits J126 and J183.

78. Atihur Palama et al constructed improvements on the lot as required by the lease. See Exhibit J129.

79. Plaintiffs James and Cynthia Wilson are the present holders of the lessee's interest in the lease covering Koke'e Camp Site Lot 43. Exhibit J157.

17. Koke'e Camp Site Lot 45

80. David Wilson Cornwell was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 45.

81. At the time of the auction (July 1985) David Wilson Cornwell was also the holder of the lessee's interest in the 1965 lease of that lot.

82. Plaintiff David Koch is the present holder of the lessee's interest in the lease covering Koke'e Camp Site Lot 45. Exhibits J144 and J147.

18. Koke'e Camp Site Lot 4

83. Plaintiff Joel Cavasso was the successful bidder in 1985 for the lease of Koke' e Camp Site Lot 4 and remains the holder of the lessee's interest in that lease.

84. Joel Cavasso was not the holder of the lessee's interest in the 1965 lease of that lot. Joel Cavasso separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

19. Koke'e Camp Site Lot 15

85. Plaintiffs Harwood D. Williamson and Nancy H. Williamson were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 15 and remain the holders of the lessee's interest in that lease.

86. At the time of the auction (July 1985) Harwood D. Williamson and Nancy H. Williamson were also the holders of the lessee's interest in the 1965 lease of that lot. Exhibit J47.

20. Koke'e Camp Site Lot 22

87. Ranbir Iwalani Khalsa was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 22.

88. Ranbir Iwalani Khalsa was not the holder of the lessee's interest in the 1965 lease of that lot. Ranbir Iwalani Khalsa separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

89. Plaintiff Barbara Putzier is the present holder of the lessee's interest in the lease of Koke'e Camp Site Lot 22. Exhibit J140.

21. Koke'e Camp Site Lot 29

90. Dezma Alec Dunn and Dorothy P. Dunn were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 29.

91. At the time of the auction (July 1985) Dezma Alec Dunn and Dorothy P. Dunn were also the holders of the lessee's interest in the 1965 lease of that lot.

92. Plaintiff Erik Paul Coopersmith is the present holder of the lessee's interest in the lease of Koke'e Camp Site Lot 29. Exhibit J158.

22. Koke'e Camp Site Lot 30

93. 9Wanda K. Wahineokai was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 30.

94. Wanda K. Wahineokai was not the holder of the lessee's interest in the 1965 lease of that lot. Wanda K. Wahineokai separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

95. Kumuwela, Inc. is the present holder of the lessee's interest in the lease covering Koke'e Camp Site Lot 30. Exhibit J 131. Plaintiff Peter Beckerman is the president of Kumuwela, Inc.

23. Koke'e Camp Site Lot 10

96. Plaintiff Michael A. Givens was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 10.

97. At the time of the auction (July 1985) Michael A. Givens was also the holder of the lessee's interest in the 1965 lease of that lot. Exhibits J45 and J64.

98. The Michael A. Givens Trust is the present holder of the lessee's interest in the ease covering Koke'e Camp Site Lot 30. Exhibit J149. Plaintiff Michael Givens is the trustee of the Michael A. Givens Trust.

24. Koke'e Camp Site Lot 8/37

99. Robert C. French and Clu1stine A. French were the successful bidders in 1985 for the lease of Koke'e Camp Site Lots 8/37.

100. Robert C. French and Christine A. French were not the holders of the lessee's interest in the 1965 lease of those lots. Robert C. French and Christine A. French separately purchased an interest in the improvements on the lots from the holders of the 1965 lease.

101. Plaintiff Læilani Corporation is the present holder of the lessee's interest in the lease covering Koke'e Camp Site Lots 8/37. Exhibit J124.

25. Koke'e Camp Site Lot 6

102. Wayne J. Jacintho and Deborah S. Jacintho were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 6 and remain the holders of the lessee's interest in that lease.

103. Wayne J. Jacintho and Deborah S. Jacintho were not the holders of the lessee's interest in the 1965 lease of that lot. Wayne J. Jacintho and Deborah S. Jacintho separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

26. Koke'e Camp Site Lot 50

104. Dorothea Okamitsu was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 50.

105. Dorothea Okamitsu was not the holder of the lessee's interest in the 1965 lease of those lots. Dorothea Okamitsu separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

106. Plaintiffs Karl L. Ramirez and Linda M. Aliboyoguen are the present holders of the lessee's interest in the lease covering Koke'e Camp Site Lot 50. Exhibits J169 and J170.

27. Koke'e Camp Site Lot 52

107. Wilfred J. and Anne K. Baldwin and A.J. and Elizabeth Toulon were the successful bidders in 1985 for the lease of Koke'e Camp Site Lot 52.

108. At the time of the auction (July 1985) Wilfred 1. Baldwin et al were also the holders of the lessee's interest in the 1965 lease of that lot.

109. Plaintiffs A.J. Toulon, Peter Baldwin, and Cecilia Williams, along with Elizabeth Toulon, are the present holders of the lessee's interest in the lease covering Koke'e Camp Site Lot 52. Exhibit J168.

28. Koke'e Camp Site Lot 13

110. Grove Farm Company, Incorporated was the successful bidder in 1985 for the lease of Koke'e Camp Site Lot 13.

111. At the time of the auction (July 1985) Grove Farm Company, Incorporated was also the holder of the lessee's interest in the 1965 lease of that lot.

112. Sheehan Family Limited Partnership is the present holder of the lessee's interest in the lease covering Koke'e Camp Site Lot 13. Exhibit J153. Plaintiff Patricia Sheehan is in some way affiliated with Sheehan Family Limited Partnership.

29. Pu'u Ka Pele Park Lot 63

113. Plaintiffs Paul and Arline Matsunaga were the successful bidders in 1985 for Pu'u Ka Pele

Park Lot 63 and remain the holders of the lessee's interest in that lease.

114. Paul and Arline Matsunaga were not the holders of the lessee's interest in the 1965 lease of that lot. Paul and Arline Matsunaga separately purchased an interest in the improvements on the lot from the holders of the 1965 lease.

ADDITIONAL STIPULATIONS

115. It would be physically impossible to relocate many of the cabins at issue from their current location without effectively destroying them.

116. The cost to dismantle and move each of the cabins at issue, that can be relocated, would near, exceed or equal the 2006 tax-assessed value of said cabins, pursuant to County of Kauai tax assessments.

117. The parties disagree as to the fair market value of the cabins at Koke'e. The State believes that fair market value must take into account the present location of the cabins and the terms of the lease and holdover, including its anticipated termination as of December 31, 2006. The State believes the fair market value may presently be zero or nearly zero. Plaintiffs believe the fair market value may be more than the tax-assessed value. Notwithstanding the disagreement and without prejudice to each parties' position as to fair market value, the parties agree that the cost

to dismantle and move each of the cabins at issue, that can be relocated, would near, exceed or equal the fair market value of said cabins.

118. None of the cabins at issue in this case could be relocated outside of Koke'e without sustaining significant physical damage to the cabins.

119. All the lots are located in the conservation district.

120. The following plaintiffs, and no others, have submitted a conservation district use application pursuant to Haw. Rev. Stat. chapter 183C seeking a conservation district use permit to remove or demolish cabins:

Carswell	Koke'e Camp Site Lot 61
Hay	Koke'e Camp Site Lot 38
Matsunaga	Pu'u Ka Pele Park Lot 63
Beckennan	Koke'e Camp Site Lot 30
Cavasso	Koke'e Camp Site Lot 4
Coopersmith	Koke'e Camp Site Lot 29
Cox	Pu'u Ka Pele Park Lot 12
Dunford	Koke'e Camp Site Lot 47
Jones	Koke'e Camp Site Lot 86
Kyno	Koke'e Camp Site Lot 81
Givens	Koke'e Camp Site Lot 10
	Koke'e Camp Site Lot 42/44

Ramirez/Alimboyoguen

	Koke'e Camp Site Lot 50
Sweney	Pu'u Ka Pele Park Lot 71
Taylor	Koke'e Camp Site Lot 85
Waimea Garage, Ltd.	
	Koke'e Camp Site Lot 58
Williams/Baldwin/Toulon	
	Koke'e Camp Site Lot 52
Williamson	Koke'e Camp Site Lot 15
Wilson	Koke'e Camp Site Lot 43
Koke'e Mountain House Inc.	
	Koke'e Camp Site Lot 89

121. To the extent that the Court finds that fair resolution of the issue of whether compensation for any given cabin is required is not readily ascertainable from the testimony of the "representative plaintiffs" and the stipulations and exhibits in evidence at phase one of the bifurcated trial, because of a lack of evidence as to the cost of relocating that particular cabin, the amount of damage to the particular cabin that would be associated with relocation, or identification or whether said cabin can actually be moved out of Koke'e, plaintiffs shall be permitted to present additional evidence (and defendant is entitled to rebut the same) in a further proceeding before the matter is decided as to that particular cabin by the trial court.

122. As of November 2006, each named plaintiff is the owner, or affiliated with the owner of (at least) some interest in the cabins at issue (except

Blair/Wong and Wisen as to which there is a dispute).

123. The State of Hawaii refused to allow the successful bidders in the 1985 auction to alter any of the terms in the 1985 lease as presented to them after the auction.

DATED: Lihue, Hawai'i, Oct 30, 2006.

s/ William J. Wynhoff
WILLIAM J. WYNHOFF
Deputy Attorney General
Attorney for State of Hawai'i

s/ Daniel G. Hempey
DANIEL G. HEMPEY
Attorney for Plaintiffs

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT STATE OF HAWAI'I

DONN CARSWELL, et al. Plaintiffs, vs. DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I, INDIVIDUAL DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10 AND DOE ENTITIES 1-10, Defendants.	CIVIL NO. 06-1-0049 (Injunctive Relief) (Declaratory Judgmen FIRST AMENDED COMPLAINT; EXHIBITS; SUMMON

FIRST AMENDED COMPLAINT

(Filed June 20, 2006)

Come now, DONN CARSWELL, GALE CARSWELL, FRANK O. HAY, PAUL T. MATSUNAGA, ARLINE Y. MATSUNAGA, PETER K. BALDWIN, ERIK P. COOPERSMITH, FRANK W.N. COX, ELIZABETH DUNFORD, JOANN GIVENS, MICHAEL GIVENS, LEALANI CORPORATION, SHERILL E. MILLER, ROBERT T. SWENEY, A.J. TOULON,

JR., ELIZABETH TOULON, WAIMEA GARAGE, LTD., CECELIA A. WILLIAMS, HARWOOD D. WILLIAMSON, NANCY H. WILLIAMSON, CYNTHIA WILSON, JAMES WILSON and DOES 1-113 ("Plaintiffs"), through their undersigned attorneys, and hereby allege and aver as follows:

JURISDICTION AND PARTIES

1. The Circuit Court of the Fifth Circuit has jurisdiction over this matter pursuant to, inter alia, Haw. Rev. Stat. §§ 603-21.5, 603-21.8, 661-1 and 91-14.

2. Venue is proper in this Court pursuant to Haw. Rev. Stat. § 603-36(5).

3. Plaintiffs Donn Carswell and Gale Carswell ("Carswells") are residents of the County of Kauai, State of Hawaii.

4. Plaintiff Frank O. Hay ("Hay") is a resident of the County of Kauai, State of Hawaii.

5. Plaintiffs Paul T. Matsunaga and Arlene Y. Matsunaga ("Matsunagas") are residents of the County of Kauai, State of Hawaii.

6. Plaintiff Peter K. Baldwin ("Baldwin") is a resident of the County of Kauai, State of Hawaii.

7. Plaintiff Erik P. Coopersmith ("Coopersmith") is a resident of the County of Kauai, State of Hawaii.

8. Plaintiff Frank Cox ("Cox") is a resident of the County of Kauai, State of Hawaii.

9. Plaintiff Elizabeth Dunford ("Dunford") is a resident of the County of Kauai, State of Hawaii.

10. Plaintiffs Joann Givens and Michael Givens ("the Givenses") are residents of the County of Kauai, State of Hawaii.

11. Plaintiff Lealani Corporation ("Lealani Corp.") is a Hawaii corporation with its principle place of business in the County of Kauai, State of Hawaii.

12. Plaintiff Sherill E. Miller ("Miller") is a resident of the State of California.

13. Plaintiff Robert T. Sweney ("Sweney") is a resident of the County of Kauai, State of Hawaii.

14. Plaintiffs A.J. Toulon, Jr. and Elizabeth Toulon ("the Toulons") are residents of the County of Kauai, State of Hawaii.

15. Plaintiff Waimea Garage, Ltd. ("Waimea Garage") is a Hawaii corporation with its

principle place of business in the County of Kauai, State of Hawaii.

16. Plaintiff Cecelia Williams ("Williams") is a resident of the County of Kauai, State of Hawaii.

17. Plaintiffs Harwood D. Williamson and Nancy Williamson ("the Williamsons") are residents of the City and County of Honolulu, State of Hawaii.

18. Plaintiff Cynthia Wilson is a resident of the County of Kauai, State of Hawaii. Plaintiff James Wilson is a resident of the State of Colorado. (Referred to hereinafter together as "the Wilsons".)

19. Doe Plaintiffs are all owners of cabins in Koke'e and Waimea Canyon State Parks in the County of Kauai, State of Hawaii.

GENERAL BACKGROUND

20. Koke'e and Waimea Canyon State Parks on the island of Kauai are home to numerous historic cabins.

21. Upon information and belief, the first permanent and most historic recreational cabin at Koke'e was built about 1850.

22. In 1918, the Territorial Board of Agriculture and Forestry established forty seven

camp sites along the Koke'e and Halemanu streams in what later became the Koke'e State Park.

23. Over time, the Territory of Hawaii established approximately 140 camp lots, many of which were built upon. In May 1952, the Governor of the Territory of Hawaii established Koke'e Park, Kauai, and forest reserve.

24. In 1965, the Senate of the State of Hawaii recognized that many "Permittees" who had built on their lots in Koke'e had expended substantial sum for improvements on these lots. Therefore, the Senate in Senate Resolution No. 25, Third Legislature, 1965, State of Hawaii requested the Department of Land and Natural Resources ("DLNR") "to cancel the permits ... and lease said lots, provided that the present Permittees are given preference when such leases are issued."

25. In 1965, the law governing the disposition of State land was amended to provide for the direct issuance of leases for recreation residence purposes covering lots within parks, forest reserves, and other areas under executive control. That law is now Haw. Rev. Stat. § 171-44, which reads:

> Notwithstanding any limitations to the contrary, the board of land and natural resources may lease, by direct negotiation and without

recourse to public auction, lands within a state park or forest reserve and other lands set aside under executive orders, for recreation-residence use for a period not to exceed twenty years on such terms and conditions as may be prescribed by the board.

26. In 1965, the State directly negotiated leases with cabin owners in Koke'e and Waimea Canyon State Parks.

27. The first public auction for the leases in Koke'e was held in July of 1985.

FACTUAL ALLEGATIONS

28. Plaintiff Carswells are legal owners of a historic cabin located at Lot 61, Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:28. The Carswells bought the cabin in 1965 for $5,000.00.

29. Plaintiff Hay is the legal owner of a historic cabin located at Lot 38, Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:43. Hay bought the cabin in 1975 for approximately $16,500.00.

30. Plaintiffs Matsunagas are the legal owners of a historic cabin located at Lot 63, Pu'u Ka Pele Lots in Waimea Canyon State Park on Kaua'i,

Tax Map Key 1-4-02:63. The Matsunagas bought the cabin in 1985 for approximately $10,000.

31. Plaintiffs Baldwin, Williams and the Toulons jointly own a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-3:03.

32. Plaintiff Cox inherited and is the legal owner of a historic cabin located on the Pu'u Ka Pele Park Lots in Waimea Canyon State Park on Kaua'i, Tax Map Key 1-4-02:47.

33. Plaintiff Coopersmith is the legal owner of a historic cabin located at Lot 29, Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:21. Coopersmith bought the cabin in 2000 for approximately $12,000.00.

34. Plaintiff Dunford inherited and is the legal owner of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:03.

35. Plaintiff Lealani Corp. paid for and is the legal owner of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:14. Robert C. French is President of Lealani Corp.

36. Plaintiffs Givenses paid for and are the legal owners of a historic cabin located on the

Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-03:09.

37. Plaintiff Miller has an equitable interest in a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:04. The cabin has been in Miller's family since the 1920s. Her father is the legal owner and leaseholder, and has given Miller power of attorney over all matters relating to the family's cabin.

38. Plaintiff Sweney paid for and is the legal owner of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-02:68.

39. Plaintiff Waimea Garage is the legal owner of a cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:24. Waimea Garage bought the cabin in 1985 for $13,800.00. Will E. Miyake is the President of Waimea Garage.

40. Plaintiffs Williamsons inherited and are the legal owners of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-03:13.

41. Plaintiffs Wilsons paid for and are the legal owners of a historic cabin located on the Koke'e Camp Site Lots in Koke'e State Park on Kaua'i, Tax Map Key 1-4-04:08.

42. Plaintiff Does are legal owners of cabins located in Koke'e State Park and Waimea Canyon State Parks on Kaua'i.

43. Defendant State of Hawai'i owns the land on which each of the Plaintiffs' cabins is located.

44. On or about December 1985, the State leased the lots on which Plaintiffs' cabins sit for a period of 20 years ("the leases"). A copy of the lease is attached as Exhibit "A".

45. Doe Plaintiffs executed leases with the State identical in all material terms except for price, name and location.

46. The leases were drafted by the State.

47. The expiration of the lease term as defined in Exhibit A was on December 2005.

48. Prior to the expiration of the leases, Plaintiffs entered into a Holdover Lease with the State, which extended the lease expiration date one year, through December 2006.

49. In a Submittal to the BLNR dated September 9, 2005, Daniel S. Quinn, State Parks Administrator for the DLNR, made several proposals for the process of entering into new leases after December 2006.

50. On or about September 9, 2005 the Board of Land and Natural Resources ("BLNR") held a meeting and considered Mr. Quinn's Recommendations.

51. At the September 9, 2005 meeting, the BLNR added and approved Recommendation 4a which read, "An existing lessee has the opportunity to match the highest bidder in order to retain his/her cabin." See Exhibit "B".

52. At the September 9, 2005 meeting, the BLNR also added and approved Recommendation 4b which read, "Any new lessee through the auction shall pay the former lessee the assessed value of the improvements." See Exhibit "B".

53. Finally, at the September 9, 2005 meeting, the BLNR amended and approved Recommendation 4 to read:

> That the Board approves use of [~~drawings~~] an auction as described in this submittal and as authorized in § 171-15 and 171-16, HRS, to select lessees for those structures and lots not disposed through direct negotiations, the RFQ/RFP bid process, or retained for use by DLNR Divisions.

See Exhibit "B".

54. On or about February 10, 2006, the BLNR held a meeting to discuss and decide, among other things, issues related to the leases in Koke'e and Waimea Canyon State Parks.

55. The Agenda of the February 10, 2006 Board meeting gave notice that the Koke'e Lease issue would be addressed as: "Request Approval for Disposition of Recreation Residence Leases at Puu Ka Pele, Halemanu, and Koke'e Camp Lots through Direct Negotiations, and Drawing, Koke'e and Waimea Canyon State Parks, Waimea, Kauai." Attached as Exhibit "C".

56. On or about February 10, 2006, Daniel S. Quinn, State Parks Administrator for the DLNR, filed a Submittal stating that the BLNR's actions at the September 9, 2005 meeting were contrary to state law, according to the Attorney General, and that "there will be no compensation to the prior lessees for those improvements remaining on the lots." See Exhibit "D".

57. Based on Quinn's recommendation and the testimony at the February 10, 2006 meeting, the BLNR rescinded their approval of Item E-1 from the BLNR meeting of September 9, 2005. In doing so, the BLNR rescinded the requirement that a new lessee pay the former lessee for the value of the improvements on the lease lot.

58. At the February 10, 2006 meeting, the BLNR amended and approved Recommendation

1, which provides that new leases will go to the highest bidder in a public auction. See Exhibit "E".

59. At the February 10, 2006 meeting, the BLNR amended and approved Recommendation 3, to read, "The Department will retain approximately nine (9) cabins for State use." The BLNR gave no indication at the February 10, 2006 meeting what this "State use" would be. See Exhibit "E".

60. BLNR staff have indicated that the public auction would be held sometime in the fall of 2006.

61. At the February 10, 2006 meeting, the BLNR also discussed the issue of compensation to current cabin owners/lease holders.

62. On or before the February 10, 2006 BLNR meeting, the State announced its position that at the end of the current lease period, all improvements on the leased land (including cabins) revert to the ownership of the State.

63. On or before the February 10, 2006 BLNR meeting, the State announced its position that it would not pay any compensation to plaintiff cabin owners who effectively surrendered their cabins to the state by failing to remove them prior to the expiration of the lease term in December 2006.

64. Prior to the February 10, 2006 BLNR meeting, the State further announced that cabin owners who did not wish for their cabins to revert to the State without compensation had the right to remove the cabins from the subject leased lands at the cabin owners' expense.

65. Upon information and belief, any cabin owner wishing to remove and rebuild their cabin would be required to obtain a Conservation District Use Application ("CDUA") and a building permit.

66. Upon information and belief, the Department of Land and Natural Resources has 180 days, or approximately six (6) months to consider a CDUA application.

67. Upon information and belief, to move some of the cabins will require grading and road preparation.

68. Upon information and belief, it would take a minimum of one week to move a cabin to a new location.

69. Upon information and belief, there are very few companies on the island of Kauai that are qualified to remove historic cabins such as those at issue in this case.

70. Upon information and belief, given the small number of professional house movers available on Kauai, it would be impossible for each plaintiff to remove his or her cabin between the time of the auction and the December 2006 deadline.

71. Upon information and belief, it would take time well beyond the December 2006 deadline to effect the removal of each cabin by Plaintiffs (including Does).

72. Upon information and belief, it would be physically impossible to remove and rebuild several of the Plaintiff-owned cabins.

73. Upon information and belief, the cost of removing the subject cabins (those cabins which could be removed and rebuilt) exceeds the fair market value of said cabins.

74. The "option" of surrendering the cabins to the State for no compensation is an unconstitutional taking within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 20 of the Hawai'i Constitution.

75. The "option" of removing the cabins prior to December 2006 is an unconstitutional taking in as much as it would be physically impossible for plaintiffs to remove their cabins between the public auction and the expiration of the leases.

76. Similarly, the "option" of removing the roughly one hundred (100) cabins in Koke'e in a timely manner is impossible.

77. Upon information and belief, the cost of removing and rebuilding the subject cabins (those which can be removed and rebuilt) exceeds the fair market value of said cabins.

78. The "option" of removing the cabins prior to December 2006 is an unconstitutional taking because the effect on plaintiffs is a total loss of value in their cabins.

79. Any of the "options" offered by the State results in an unconstitutional taking within the meaning of Fifth Amendment to the United States Constitution and Article I, section 20 of the Hawai'i Constitution.

80. Plaintiffs have not waived their right to be compensated in the event the State of Hawai'i assumes ownership.

81. Plaintiffs have not waived their right to be compensated for the cost of removing and rebuilding the cabins.

82. Plaintiffs have not waived their right to be compensated in the event that it is physically impossible to remove the cabins within the time constraint imposed by the State.

83. The 1985 lease contains ambiguous terms as it relates to the disposition of the subject cabins at the end of the lease term.

84. To the extent that the State may have attempted to induce Plaintiffs to waive their right to compensation, such waivers must fail because: a) Plaintiffs were never informed of the constitutional dimension of any alleged waiver; and b) any alleged waiver (by contract or otherwise) is unintelligible and ambiguous.

85. Plaintiffs have a constitutional right to be justly compensated in the event that the State takes their property.

86. When the State's action results in a total loss of value in property, it is a Taking which requires compensation. Brown v. Legal Found., 538 U.S. 216, 234 (2003) quoting Yee v. Escondido, 503 U.S. 519, 523 (1992).

87. Waiver of a constitutional right must be voluntary, knowing and intelligent. Fuentes v. Shevin, 407 U.S. 67, 94, 95 (1972).

88. Plaintiffs have not knowing and intelligently waived their constitutional right to be justly compensated.

89. On or about February 21, 2006, Plaintiffs requested a contested hearing by the BLNR to address compensation issue. Attached as Exhibit C.

90. On or about March 10, 2006, the BLNR denied the request for a contested case hearing.

91. Notice of the BLNR's decision to deny the request for a contested case hearing was sent to Plaintiff Carswell on March 15, 2006.

COUNT ONE: DECLARATION AND INJUNCTION FOR PROTECTION OF PROPERTY RIGHTS AND RIGHT TO COMPENSATION UNDER THE FIFTH AMENDMENT OF THE FEDERAL CONSTITUTION AND ARTICLE I, SECTION 20 OF THE HAWAI'I STATE CONSTITUTION

92. Plaintiffs reallege each and every allegation contained in the preceding paragraphs with the same force and effect as if here set forth in full.

93. Under any "option" set forth above by the state, unless the state pays fair market value to cabin owners, the state is violating the requirement to give just compensation under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 20 of the Hawai'i State Constitution and relevant case law.

94. The taking of Plaintiffs cabins is not for a public purpose under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, section 20 of the Hawai'i Constitution, and relevant case law.

95. Therefore, Plaintiffs request declaratory and injunctive relief as follows:

a. Plaintiffs request a declaration that the actions of the State set forth above constitute a taking of Plaintiffs property under the Fifth Amendment to the United States Constitution, Article I, section 20 of the Hawai'i Constitution and relevant case law.

b. Plaintiffs request a declaration that the State may not proceed to auction the subject leases without giving cabin owners a reasonable amount of time to remove their cabins.

c. Plaintiffs request a declaration that the State must pay just compensation (fair market value) to Plaintiffs whose cabins are taken by the State.

d. Plaintiffs request a declaration, which determines the nature and elements of compensation.

COUNT TWO: DECLARATION AND INJUNCTION UNDER CHAPTER 101 OF THE HAWAI'I REVISED STATUTES AND ARTICLE I, SECTION 5 OF THE HAWAI'I CONSTITUTION

96. Plaintiffs reallege each and every allegation contained in the preceding paragraphs with the same force and effect as if here set forth in full.

97. Chapter 101 of the Hawai'i Revised Statutes governs the taking of property by the State for a public purpose.

98. The taking of Plaintiffs' cabins is a Taking within the meaning of Chapter 101.

99. The State failed to follow the procedures required by Chapter 101 with regard to Plaintiffs' cabins.

100. Plaintiff's right to the procedure set forth in Chapter 101 is protected by the Due Process Clause of Article I, Section 5 of the Hawai'i State Constitution.

101. The State's actions as set forth above constitutes a violation of the Plaintiffs' due process rights for which Plaintiffs' are entitled to relief.

102. Therefore, Plaintiffs request a declaration and injunctive relief that the State cannot take ownership or possession of Plaintiffs' cabins on January 1, 2007.

COUNT THREE: DECLARATION AND INJUNCTION UNDER HAW. REV. STAT. CHAPTER 91

103. Plaintiffs reallege each and every allegation contained in the preceding paragraphs with the same force and effect as if here set forth in full.

104. Plaintiffs were entitled to notice under Haw. Rev. Stat. Chapter 91 and Haw. Admin. Rules Title 13 before the BLNR discussed and decided the issues of compensation at the February 10, 2006 meeting.

105. BLNR meeting did not properly notice, as alleged in Paragraph 42, that issues related to taking and compensation thereof would be discussed at the February 10, 2006 meeting.

106. BLNR's failure to properly notice the February 10, 2006 meeting prejudiced the ability of the public, and Plaintiffs in particular, to provide input into the issue of compensation to current leaseholders for their cabins.

107. Therefore, Plaintiffs request a declaration that any decision made by the BLNR at the February 10, 2006 meeting regarding the payment of compensation to current leaseholders for their cabins is void due to improper notice.

WHEREFORE, Plaintiffs respectfully requests the following relief:

a. That the Court award such declaratory and injunctive relief as pleaded herein;
b. That the Court order Defendants to pay Plaintiffs' attorneys' fees; and
c. That the Court award such other and further relief as is just and equitable.

DATED: Lihue, Hawai`i, June 20, 2006.

s/ Daniel G. Hempey
Daniel G. Hempey
Elif Z. Yarnall
Attorneys for Plaintiffs